INDEX

TABLE OF CONTENTS

Page

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional and Statutory Provisions Involved 4
Statement of the Case 4
How Federal Questions are Presented 7
Reasons for Granting the Writ:– 15

I. The Judgments and Opinions of this Court in the five (5) so-called obscenity pornography cases entered on June 21, 1973, and on which the Supreme Court of the State of Georgia relied in its decision on remand (October 30, 1973), were constitutionally invalid and repugnant to Petitioners' rights under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution insofar as those five (5) cases were applied to said Petitioners in the adverse Judgment rendered by the Georgia Supreme Court 15

II. The provisions of Georgia Code 26-2101 as written and applied to Petitioners herein are repugnant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and

Page

in particular the constitutionally permissive strict standards laid down by this Court in *Miller v. California*, 413 U.S. 15 64

III. The two motion picture films involved in the case are not obscene in the constitutional sense and thus are protected expression under the First and Fourteenth Amendments to the Constitution of the United States, as the same was applicable during the period of time covered by the alleged conduct charged against Petitioners 91

IV. The various United States Supreme Court rulings on obscenity promulgated on June 21 and June 25, 1973, effecting a substantial decisional change in the application of constitutional principles cannot be applied retroactively to Petitioners in the case at bar for conduct occurring prior to those decisions, and, the application of the statute to said Petitioners is void as Ex Post Facto legislation by virtue of Article I, Sections 9 and 10 of the United States Constitution and the Due Process Clause of the Fifth and Fourteenth Amendments 99

A. Blackstone's retroactive theory that a court merely discovers what the law has always been was rejected by the U.S. Supreme Court 105

B. Lack of fair notice rule 106

C. Analysis of the Miller decision 107

D. United States v. 12-200 Ft. Reels footnote - prospective application 108

Page

E. Ex post facto judicial lawmaking prohibited 111

Conclusion 114

APPENDIX PRINTED SEPARATELY

Appendix A
Order of Trial Judge dated April 12, 1971 2

Appendix B
Decision of the Georgia Supreme Court in Slaton, et al v. Paris Adult Theatre, et al (October 30 ,1973 4

Appendix C
First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Georgia Code §26-2101 15

Appendix D
Undecided Cases 18

TABLE OF AUTHORITIES

Cases Page

Aday v. United States, 388 U.S. 447 (1967) 90
Austin v. Kentucky, 386 U.S. 767 (1967) 94
Avansino v. New York, 388 US 446 (1967) 95
Bantam Books v. Sullivan, 372 U.S. 58 93
Bijou Theatre of Knoxville, Inc. et al., v.
State of Tennessee, S.W.2d 72
Bloss v. Michigan, 402 U.S. 938 (1971) 92,95
Books, Inc. v. United States, 388 U.S. 449 (1967) 95
Breard v. Alexandria, 341 U.S. 662 78,80
Brown v. U.S.A. F.2d (1973) 73
Butler v. Michigan, 352 U.S. 380 34,55,56,80
Burstyn v. Wilson, 343 U.S. 495 44,80
Cain v. Kentucky, 397 U.S. 319 (1970) 92,95
Calder v. Bull, 3 Dall 386, 390 95
Carlos v. New York, 396 U.S. 119 (1969) 95
Central Magazine Sales, Ltd. v. United States,
389 U.S. 50 (1967) 95
Chance v. California, 389 U.S. 89 (1967) 95
Chaplinsky v. New Hampshire, 315 U.S. 568 35
Childs v. Oregon, 401 U.S 1006 (1971) 70
City of Kansas City v. O'Connor No. 57266 70
City of Kansas City v. McNellis No. 58132 70
City of Kansas City v. Reed No. 58133 73
Cobert v. New York, 388 U.S. 443 (1967) 70
Cobert v. N.Y., 388 U.S. 444 92,94
Cohen v. California, 403 U.S. 15 43,44,47
Commonwealth v. Claflin, 298 N.E. 2d 888
(Mass. 1973) 70
Conner v. City of Hammond, 389 U.S. 48 (1967) 95
Connolly v. General Construction Co., 269 U.S.
385, 391 103
Corinth Publications, Inc. v. Wesberry,
388 U.S. 448 (1967) 95,98
Cote v. U.S.A., 413 U.S. 915 65
Desist v. United States, 394 U.S. 244
248 (1969) 100,101

Page

Eisenstadt v. Baird, 405 U.S. 438 50
England v. Board of Medical Examiners,
375 U.S. 411 85
Evans Theatre Corp. v. Slaton, 277 Ga. 377, 379
[180 S.E.2d 712] (1971) 11,86,88
Felton v. City of Pensacola, 390 U.S. 349 (1968) 95
Friedman v. New York, 388 U.S. 441 (1967) 95
Gent v. Arkansas, 386 U.S. 767 (1967) 94
Ginsberg v. New York, 390 U.S. 629 32
Ginzburg v. United States, 383 U.S. 463 33,93,97
Gosa v. Mayden, et al, 413 U.S. (1973) 100
Great Northern R. Co. v. Sunburst Oil & Refining Co.,
287 U.S. 358 85
Grigsby v. Tennessee, S.W.2d , (1973) 73
Griswold v. Connecticut, 381 U.S. 479 49
Grove Press v. Gerstein, 378 U.S. 577 (1964) 98
Gulf States Theatres of La., et al v. John
Richardson and George W. D'Artois, Sup.
Ct. of La. No. 54,044 (12-3-73) 66,70
Hamar Theatres v. Cryan, et al, D.C. N.J.
F.Supp. (1973) 70
Harding v. U.S. 42 L.W. 3241 65
Harlow v. City of Birmingham, Ala. Ct. App.
(1-15-74) 68
Hartstein v. Missouri, 404 U.S. 988,
30 L.Ed.2d 539 (1971) 95
Henry v. State of Louisiana, 392 U.S. 655 (1968) 95
Hoyt, et al, v. State of Minnesota,
399 U.S. 524 (1970) 95,98
IM Amusement Corp. v. Ohio, 389 U.S. 454 (1967) 92
Jacobellis v. Ohio, 378 U.S. 184 93,96
James v. United States, 366 U.S. 213
(1961) 106
Jenkins v. The State, 199 S.E.2d 183 69
Kaplan v. California, 413 U.S. 115 51,84
Kaplan v. U.S., No. 5452, D.C. Ct. of App.
(11-21-73) 30,68
Keney v. New York, 388 U.S. 440 (1967) 94

Page

King v. Missour, 107 U.S. 221, 135 92,104
Kois v. Wisconsin, 408 U.S. 229, (1972) 77
Kovacs v. Cooper, 336 U.S. 77 35,80
Lanzetta v. New Jersey, 306 U.S. 451 103,106
Lernon v. Kurtzman, 403 U.S. 602 42
Linkletter v. Walker, 381 U.S. 618 (1965) 85,100,105
Love v. Fitzharris, 460 F.2d 382,
385 (9th Cir. 1972) 111
Mazes v. Ohio, 388 U.S. 454 (1967) 95,98
Memoirs v. Massachusetts, 383 U.S. 413 19,80,93,97
Jerry McCright, et al v. Allen I. Olsen, et al
D.C. N.D. F.Supp. (1973) 71
Chester McKinney v. City of Birmingham,
Ala. Ct. App. (10-30-73) 71
Michigan v. Payne, 412 U.S. 47 (1973) 101
Miller v. Calif., 413 U.S. 15 2,13,15,19,46,64,116
Mitchum v. Tennessee, S.W.2d (1973) 72
Mohney v. State of Indiana, 300 N.E.2d
66 (1973) 67,69,102
N.A.A.C.P. v. Button, 371 U.S. 415, 83 S. Ct.
328 (9 L. Ed. 2d 405) 76
New York Times Co. v. Sullivan, 376 U.S. 254 43,44
1024 Peachtree Corp. v. Slaton, 228 Ga. 102
(184 SE2d 145) (1971) 11,86,87
Palmer v. City of Euclid, 402 U.S. 544 (1961) 104
Papachristou v. City of Jacksonville, 405 U.S.
156 (1972) 104
Papp v. State, 281 So.2d 600 (1973) 68
Paris Adult Theatre v. Slayton,
413 U.S. 49 6,19,26,32,48,51,54,55,64,65
People of the State of California v. Enskat
109 Cal Rptr 433 68
People of the State of New York v. Jim Bucklay
and Al Goldstein No. 297 71
People of the State of New York v. Saul Heller
No. 184 71
Pinkus v. Pitchess, 429 F.2d 416 (CA-9 1970) 98
Potomac News Co. v. United States,
389 U.S. 47 (1967) 95

Page

Prince v. Massachussets, 321 U.S. 158 80
Public Utilities Comm. v. Pollak,
343 U.S. 451 80
Quantity of Books v. Kansas, 388 U.S. 452 (1967) 90,95
Rabe v. Washington, 405 U.S. 313 33,34,80,81,104
Ratner v. California, 388 U.S. 442 92,94
Redlich v. Capri Cinema, 347 N.Y. Supp. 2d, 811 71
Redrup v. New York, 386 U.S. 767 6,76,77,80
Regina v. Hicklin, 354 U.S. 489,
41 U.S.L.W. 4930 40,41,60
Rhodes v. State, So.2d (1973) 68
Robert-Arthur Management Corp. v. Tenn. 389
U.S. 578 (1968) and 414 S.W.2d 638
(1967) 90,91,92,95
Robinson v. Neil, 409 U.S. 505 (1973) 101
Rosenbloom v. Metromedia, Inc. 403 U.S. 29 44
Roth v. United States, 354 U.S. 19,21,37,45,78,79
Rowan v. Post Office Dept. 397 U.S. 728 24,34
Schackman v. Calif., 388 U.S. 454 (1967) 90,92,95
Shuttlesworth v. Birmingham, 394 U.S. 147 111
Southeastern Promotins, Ltd v. Conrad, et al,
486 F.2d 894 74
Smith v. California, 361 U.S. 147 54
Stanley v. Georgia, 394 U.S. 557 16,47,51,58,79,97
State v. Edward J. Wedelstedt, David Cory & Wayne
Davis Iowa (N.W.2d (1973) 69
State v. Richard Lee McNutt No. 52, 489
So.2d (1973) 66,69
State, ex rel, Sensenbrenner v. Adult Book Store,
301 N.W.2d 695 (1973) 72
State v. Shreveport News Agency, Inc.
So.2d (1973) 66,69
Stroud v. State, 300 N.E. 2d 100 (1973) 67
State, ex rel Keating v. Vixen, 35 Ohio St.2d
215 (1973) 71
State v. J-R Distributors, Inc. 512 P.2d
1049 (1973) 73
State of New York Court of Appeals
Decided: December 28, 1973
NE2d (1973) 72

Page

State v. Watkins S.E.2d (1973) 72
State of Wisconsin, ex rel, Joseph Chobot
v. Circuit Court for Milwaukee City
N.W.2d (1973) 72
Stovall v. Denno, 388 U.S. 293, 297 (1967) 100
Stroud v. State, 300 N.E.2d 100 (1973) 69,103
Thompson v. Utah, 170 U.S. 343 111
Thornhill v. State of Alabama, 310 U.S. 88, 98,
60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940) 76
Times Film Corp. v. Chicago, 365 U.S. 43,
47-50 (1961) 78
U.S.A. v. Cangiano, et al, F.2d (1973) 73
U.S.A. v. Cote, 485 F.2d 574 (1973) 74
United State v. Fay, 333 F.2d 12, 15-16
(2d Cir. 1964) 105
U.S.A. v. Friedman & Peachtree Nat'l
Distributors F.2d (1973) 74
U.S. v. Hamling, 481 F.2d 307 (1973) 74
United States v. Harriss, 347 U.S. 612,
617 103,106
U.S.A. v. Henson, F.2d (1973) 74
U.S.A. v. Joseph Vinacco No. 7971 D.C. R.I.
F.Supp. (1973) 75
U.S.A. v. Richard Shappy No. 7972 D.C. R.I.
F. Supp. (1973) 75
U.S.A. v. Guarino, et al No. 7968 D.C. R.I.
F. Supp. (1973) 75
U.S.A. v. Coleman, No. 7970 D.C. R.I.
F. Supp. (1973) 75
U.S. v. Lang, 361 F. Supp. 380 (1973) 75,101
U.S.A. v. National Dairy Products Corp,
372 U.S. 29, 32 (1963) 75
U.S.A. v. One Reel of Film, 481 F.2d
206 (1973) 73
U.S.A. v. Orito, 413 U.S; 139 64,78
United States v. Reidel, 402 U.S. 351,
354 (1972) 78,80
U.S.A. v. Sians, F.2d (1973) 74

Page

U.S.A. v. Thevis & Peachtree News, 484 F.2d 1149 (1973) 73
United States v. 12 200 Ft. Reels of Film 413 U.S. 123 2,51,65,78,86,101,115
U.S.A. v. West Coast News Co., Inc. 357 F.2d 855 1966) 90
Walter v. Slaton, 227 Ga. 676,680 (182 S.E.2d 464) 1971) 11,89
Walter v. State of Ohio, 398 U.S. 434 (1970) 91
Walker v. State of Ohio, 398 U.S. 434, 435 91,95
Walz v. Tax Commission, 397 U.S. 664 42
Watkins v. U.S., 354 U.S. 178, 208 (1957) 75
Winters v. N.Y. 333 U.S. 507, 510 47,97
Wright v. State of Georgia, 373 U.S. 284 (1963) 104

Other Authorities

51 Virginia Law Review 201, 254 112
Hill-Link Minority Report, p. 386 58
Province Laws, Chapter 6, Section 19, p. 1711 37
Report of the Commission on Obscenity and Pornography (1970), *et seq.* 27,29,30,37,38,39,55,57
Websters Dictionary 22

Foreign Cases

King v. Kurl, 2 Stra. 788 39
Queen v. Read, 11 Mod. Rep. 142 39
Regina v. Hicklin, L.R. 3 Q.B. 360 40,41,42
Rex v. Wilkes, 4 Burr. 2527 39
King v. Gallard, W. Kelynge, p. 162 39

Statutes

Georgia Code 26-2101 14,116

Constitutional Provisions Page

First Amendment 8,31,38,42-45,47,48,64,75
Fifth Amendment 8,64,101,106
Sixth Amendment 8,64,101,106
Fourteenth Amendment 8,64,101,106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

PARIS ADULT THEATRE, I,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE, II,
Petitioner,

v.

LEWIS R. SLATON, as District Attorney
Atlanta Judicial Circuit,
and HINSON McAULIFFE,
as Solicitor General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioners, Paris Adult Theatre I and Paris Adult Theatre II, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of the State of Georgia, entered in the entitled case on October 30, 1973.

OPINIONS BELOW

This case was the subject of review by the U. S. Supreme Court Docket No. 71-1051. The case was argued on October 19, 1972 and decided June 21, 1973. It is now reported at 413 U.S. 49. This Court vacated the judgment of the Georgia Supreme Court (decided on November 5, 1971) and remanded the case to the Georgia Supreme Court "for further proceedings not inconsistent with this opinion and *Miller v. California,* Supra (413 U.S. 15). See *United States v. 12 200 Ft. Reels of Film,* post at 130, N. 7." (413 U.S. 123).

Upon remand the Georgia Supreme Court again ruled adversely to Petitioners and reversed the trial court sitting without a jury. (See Trial Court Order which appears in Appendix A.) The decision of the Supreme Court of Georgia on remand was entered on October 30, 1973 and appears in Appendix B hereto.

JURISDICTION

The Supreme Court of Georgia rendered its decision on remand of 71-1051, on October 30, 1973. The Petition for a Writ of Certiorari is filed within Ninety (90) days of that date. Jurisdiction is invoked under *28 U.S.C. Sec. 1257(3).*

QUESTIONS PRESENTED

1. Were the Judgments and Opinions of this Court in the five (5) so-called obscenity pornography cases entered on June 21, 1973, and on which the Supreme Court of the State of Georgia relied in its decision on remand (October 30, 1973), constitutionally invalid and repugnant to Petitioners' rights

under the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* insofar as those five (5) cases were applied to said Petitioners in the adverse Judgment rendered by the Georgia Supreme Court?

2. Are the provisions of *Georgia Code 26-2101* as written and applied to Petitioners herein, repugnant to the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* and in particular the constitutionally permissive strict standards laid down by this Court in *Miller v. California*, 413 U.S. 15?

3. Are the two motion picture films involved herein obscene in the constitutional sense and thus are not protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*, as the same was applicable during the period of time covered by the conduct charged against Petitioners?

4. Can the various United States Supreme Court rulings on obscenity promulgated on June 21 and June 25, 1973, effecting a substantial decisional changed in the application of constitutional principles, be applied retroactively to Petitioners in the case at bar for conduct occurring prior to those decisions, and, is the application of the statute to said petitioners void as Ex Post Facto legislation, by virtue of *Article I, Sections 9* and *10* of the *United States Constitution* and the Due Process clause of the *Fifth* and *Fourteenth Amendments?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the provisions of Georgia Code § 26-2101 are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date. Subsequently, on the same day, two separate complaints (one for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity. Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him.

The hearing was stipulated by the parties to be a final one. At said hearing on the issue of the obscenity of the films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex and that the films were of value to society, and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name. There was no evidence that minors had ever entered the theatres or seen the films.

At the conclusion of the introduction of all evidence, the Trial Court took under advisement the Motion to Dismiss

filed by Councel for Petitioners which raised, *inter alia*, the contentions that the Georgia Criminal Obscenity Statute was both void for impossible overbreath and/or void for vagueness, as well as the concept that the subject motion picture films were not factually obscene in the Constitutional sense as a matter of law under the Roth-Memoirs-Redrup standards thought applicable at that time.

The Trial Court denied the Motion insofar as it sought to have the Georgia Criminal Obscenity Statute (Georgia Code § 26-2101) declared unconstitutional. The Trial Court held in essence that this was a close or borderline case, and in the absolute absence of any evidence that Petitioners' or their representatives had thrust the exhibition of the subject motion picture films by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive or view such material and further in the absolute absence of evidence showing any signficant danger of the subject motion picture films being exposed to juveniles, and in the absence of any evidence of Ginsburg-type pandering, the Trial Court held the subject films to be protected by the First and Fourteenth Amendments to the Constitution. These were the elements that the majority of the Supreme Court held could be determinative in a close case. *Redrup v. New York*, 386 U.S. 767 (1967)

We suggest that in the June 21, 1973 decision by this Court in the *Paris Adult Theatre*, this Court incorrectly interpreted the rationale of the trial judge in ruling as he did. (See 413 U.S. at 57.)

HOW FEDERAL QUESTIONS ARE PRESENTED

The District Attorney for the Atlanta Judicial Circuit and the Solicitor of the Criminal Court of Fulton County together filed complaints in the Superior Court of Fulton County against Petitoners and named individuals to have the films "Magic Mirror" and "It All Comes Out In The End" declared obscene. The complaint, as to each film, alleged that "the sole and dominant theme of the said motion picture film, considered as a whole and applying contemporary community standards, appeals "to the prurient interest in sex, nudity and excretion, and that the said motion picture film is utterly and absolutely without any redeeming social value whatsoever, and transgresses beyond the customary limits of candor in describing and discussing sexual matters."

The Complaints further alleged that the films were being shown in their respective theatres, to the public, on a fee basis.

The Complaints prayed that the films be declared obscene and subject to seizure; that the Defendants be temporarily and permanently enjoined from exhibiting the named films within the jurisdiction of the Court; that Defendants be temporarily restrained and enjoined from destroying, altering, concealing or removing the respective films ' without the jurisdiction of the Court; that a Rule Nisi issue requiring the Defendants to show cause on a date certain why the named films should not be declared obscene and seized by plaintiffs, and that Defendants be directed to have and produce upon the said hearing date the named motion picture films.

An order issued in each case compelling Defendants to show cause, on a date ten days subsequent to the date of service, why the prayers of the Plaintiffs should not be granted and the named motion picture films declared obscene. Defendants were also ordered to produce the films and were temporarily restrained and enjoined from concealing, destroying, altering, or removing the named motion picture films without the jurisdiction of the Court. On the date of the hearing, the Defendants appeared befory the Court and filed a Consolidated Motion to Dismiss, on the grounds, *inter alia*, that the films are not obscene in the constitutional sense and are protected expression under the *First Amendment* to the *United States Constitution* made obligatory upon the states by the *Fourteenth Amendment* and that the *Georgia Code, Sec. 26-2101*, is void for vagueness and impermissible overbreath insofar as it attempts to establish constitutional standards by which press materials can be judicially measured to determined whether they are obscene and as such is violative of the Petitioners' rights under the *First, Fifth, Sixth* and *Fourteenth Amendment* to the *Constitution of the United States.*

The Motions to Dismiss were argued to the Trial Court which overruled them. At this point, the individual Defendants, having invoked *Fifth Amendment* privileges against self-incrimination and the Court finding one individual Defendant in contempt for not producing the films, on the ground that he had no right to assert the privilege, but suspending his $100 fine, counsel for Petitionters, as an officer of the Court, made the films available to the Court. At the conclusion of the viewing and of the evidence, Petitioners renewed their Motions to Dismiss and the Court, after taking the matter under advisement, found both films to be

constitutionally protected expression when, as here, shown in a commercial theatre and surrounded by requisite notice to the public of their nature and be reasonable protection against their exposure to minors. The Motions to dismiss were granted.

The Plaintiffs below appealed directly to the Supreme Court of Georgia. The grounds of enumerated error were that the Court erred in declaring each of the films to be not obscene, in refusing to enjoin the Defendants from exhibiting each of said motion pictures, and in granting the Motion to Dismiss filed by the Petitioners.

The Georgia Supreme Court reversed the judgment of the trial court and the Petitioners herein filed a *Petition for a Writ of Certiorari* in the U.S. Supreme Court where it was docketed as No. 71-1051. Certiorari was granted on June 26, 1972 and the case was argued on October 17, 1972. Among the questions presented by the original petition, presented in Docket No. 71-1051, was whether the material was obscene in the constitutional sense, as well as reference to the constitutional relevant elements of the standards for judging proscribable obscenity under the First Amendment.

The Court decided the case on June 21, 1973, reported at 413 U.S. 49, and vacated the judgment of the Georgia Supreme Court and remanded it for consideration in light of the other so-called obscenity cases decided the same day. (i.e. *Miller, et al.*)

At the conclusion of its ruling, 413 U.S. at page 69, the Court stated in essence that "nothing precludes the State of Georgia from the regulation of the allegedly obscene material

exhibited in Paris Adult Theatre I or II, *provided that the applicable Georgia law, as written or authoritatively interpreted,* by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California, ante* at 23-25." (Emphasis supplied.)

When the case was remanded to the Georgia Supreme Court an order was passed directing all counsel to file memorandums of the effect of the remand. The issues as raised by various counsel in the Georgia Supreme Court were as follows:

A. Counsel for Paris Adult Theatres:

1. The vacation of the Judgment in this case and the remand to the Georgia Supreme Court for "further proceedings" leaves unconstitutionally vague what the duty is that is imposed upon the Appellate Court with regard to "further proceedings."

2. The U.S. Supreme Court decisions on June 21 and 25, 1973 regarding obscenity, mandates the conclusion that Georgia's Obscenity Statute [Ga. Code Sec. 26.2101, Sec. (b)] is void for vagueness in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution.

3. The Georgia Obscenity Statute cannot be applied retroactively because to do so would violate Defendant-Appellees' constitutional rights under due process and would be *ex post facto* in nature.

4. The Supreme Court of the State of Georgia should not incorporate the "Miller" definition of obscenity statute because to do so would be legislation by judicial decree.

5. The pressmaterials charged as obscene were First Amendment protected expression under the thirty-one-plus cases decided by the U.S. Supreme Court following *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

B. Counsel for Appellants Lewis R. Slaton and Hinson McAuliffe:

1. The patently offensive standard set forth in Section (b) of the kinds of conduct suggested by Chief Justice Burger is not inconsistent in effect and application with Georgia Code Section 26.2101 (customary limits of candor).

2. The Georgia Supreme Court has defined and described the conduct which offends the Georgia statute in almost the same language suggested by the Supreme Court of the United States in *Miller:* i.e. "Sexual intercourse, natural, unnatural, bizarre and violent, real or simulated; *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 379; 180 S.E.2d 712: Sexual intercourse, fellatio and cunnilingus, *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464: Sexual intercourse, cunnilingus and masturbation, *1024 Peachtree Corporation v. Slaton*, 228 Ga. 102, 104, 184 S.E.2d 145.

3. The movie films are obscene.

C. Counsel for the Attorney General for the State of Georgia, on behalf of the people of the State of Georgia:

1. The injunction should issue because applicable state law, as construed, specifically defines the conduct involved in this appeal.

2. The regulation of obscenity is not limited to protection of juveniles and unconsenting adults.

3. The civil remedies sought in this case would not subject Appellees to *ex post facto* liability or to a law which is vague or overly broad.

The issues as presented on remand to the Georgia Supreme Court thus became the issues of law considered by the Court and it's ruling was directed in fact to those issues.

On October 30, 1973, the Supreme Court of Georgia without allowing oral argument decided again the case of *Slaton v. Paris Adult Theatre, et al,* (Appendix B) and again reversed the judgment of the Trial Court and in essence ruled as follows:

I. Overbreath – The Court held that the Georgia Statute was not void for impermissible overbreath and in support of it's concept of the Statute as written, or as authoritatively construed, with regard to Petitioners herein, stated in part as follows: "In the past, this Court has defined and described conduct as obscene within the meaning of the Georgia Statute in substantially the same language as that suggest by the Supreme Court in *Miller* .... these decisions are, in effect, interpretations of that portion of the Georgia Statutory definition providing that material 'is obscene if ... its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion ...' these cases specifically 'limit' the phrase they interpret and a fair reading of them leads to the conclusion that the Georgia Statute was designed to reach only 'hard-core pornography,' outside of the First Amendment protection."

The Court went on to say "we, therefore, conclude that the Georgia Statute has been specifically delineated in a manner consistent with the new *Miller* standards. In rejecting counsel's constitutional challenge to the statute we therefore reaffirm our prior ruling that it is not overly broad or vague in definition."

II. Due Process – The Court said that the Appellees' contention that the Georgia Statute as construed cannot be applied retroactively save in violation of due process of law was erroneous because in the opinion of the Georgia Supreme Court the Georgia statutory definition has been previously authoritatively construed by the Court to include those standards for obscenity as now permitted by *Miller*. The Court went on to say, "thus, the *Memoirs* test, as construed to include standards offering greater protections to free speech and expression than those in *Miller*, is fully applicable to the pre-Miller Defendant."

The Court went on to say, "In summary, this Court has previously construed the statutory definition of obscenity in a manner authorized by the new *Miller* guidelines and therefore has not judicially enlarged Georgia Code Ann. 26-2101 (b) ... there has been no unconstitutional, subsequent, contraction of an overly broad statute to save its application retroactively."

III. Standards – The Supreme Court of Georgia has held that under *Miller v. California* the community by which obscenity standards are to be gauged is that of the State of Georgia.

It further held that expert testimony was no longer necessary where the materials themselves were available for inspection.

The Supreme Court of Georgia further held that the consenting adult theory was no longer entitled to any validity.

Whereupon the Court then made a judicial construction which they claimed was inherent in their prior judicial decision. That the definition of what is obscene or the standards to be applied under *Georgia Code Annotated 26-2101 (b)* were as follows: "Applying contemporary community standards and considering the material or film as a whole, the average person would find (a) Its predominant appeal is to prurient interest in sex; (b) the material or film is a patently offensive depiction or description of sexual conduct, emboding a shameful or morbid interest in nudity, sex or excretion and going substantially beyond customary limits of candor in describing or representing such matters; (c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value; and, (d) the material or film taken as a whole is utterly without redeeming social value."

It is thus to the decision of the Supreme Court of Georgia that we address the questions in this our *Petition for Writ of Certiorari.*

REASONS FOR GRANTING WRIT

I.

THE JUDGMENTS AND OPINIONS OF THIS COURT IN THE FIVE (5) SO CALLED OBSCENITY PORNOGRAPHY CASES ENTERED ON JUNE 21, 1973, AND ON WHICH THE SUPREME COURT OF THE STATE OF GEORGIA RELIED IN ITS DECISION ON REMAND (OCTOBER 30, 1973), WERE CONSTITUTIONALLY INVALID AND REPUGNANT TO PETITIONTERS' RIGHTS UNDER THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION INSOFAR AS THOSE FIVE (5) CASES WERE APPLIED TO SAID PETITIONERS IN THE ADVERSE JUDGMENT RENDERED BY THE GEORGIA SUPREME COURT.

Introduction and Summary

The five obscenity cases decided by the Court on June 21, 1973[1] depend for their correctness upon the validity of each of a series of five legal or factual propositions:

(1) That "obscenity," as defined in *Miller v. California*, 41 U.S.L.W. 4925, is "unprotected" by the First Amendment;

---

[1] *Miller v. California*, 413 U.S. 15; *Paris Adult Theatre v. Slayton*, 413 U.S. 49; *United States v. Orito*, 413 U.S. 142; *Kaplan v. California*, 413 U.S. 115; *United States v. 12 200 Ft. Reels*, 413 U.S. 123.

(2) That the right of privacy to read "obscene" sexual materials of one'e own choice, recognized in *Stanley v. Georgia*, 394 U.S. 557, is applicable only within "a place, the home";

(3) That there are "legitimate State interests" supporting prohibitions upon consensual distributions of sexual material between adults;

(4) That the constitutional definition of "obscene" adopted in *Miller v. California* provides "fair notice" and "concrete guidelines" regarding what is and what is not "obscene";

(5) That the same constitutional definition of "obscene" is applicable to prohibitions upon consensual distributions of sexual materials to adults as is applicable to prohibitions upon the "thrusting" of such materials upon unwilling recipients.

Each of these propositions is demonstrably false in fact, logic, or precedent. Since the correctness of the June 21 decisions rests upon the validity of *all* these propositions, rehearing would be required if any one of them were plainly false. Rehearing is essential when every link in the Court's chain of reasoning is demonstrably defective.

In addition, the Court's June 21 decisions flow from two separate procedural errors which infect the entire decisional process:

(1) One element of the constitutional definition of "obscene" applied in all of the cases – that the material in question lack "serious literary, artistic, polical or scientific value" – was adopted by the

Court *sua sponte* without argument or prior notice to the parties or *amici;*

(2) The Court totally ignores the findings of the Commission on Obscenity and Pornography, a research and advisory body established and funded by the Congress of the United States, with membership appointed by the President. The findings of this body are completely inconsistent with the Court's holdings.

The brief which follows separately discusses each of the Court's fundamental mistakes of judgment or process. The picture which emerges is one of colossally erroneous constitutional adjudication.

I. This Court has adopted a new "serious ... value" test for obscenity without prior notice or argument. Such a course of action would, if permitted to stand, violate the most fundamental principles of fairness as well as deprive the Court of useful argument on a controversial constitutional innovation.

Prior to the Court's decision in *Miller v. California,* no work was held obscene by this Court unless it was "utterly without redeeming social value." This was the view of a plurality of the membership of the Court. When joined by the view of other members of the Court that expression is always protected from obscenity laws, it constituted the operative constitutional standard. A majority of the Court in the *Miller* opinion, however, alters this standard so that it is now necessary to show, not that the work is "utterly without redeeming value" but that "taken as a whole," it lacks "serious literary, artistic, political or scientific value." (413 U.S. 23-24) The Court appears to assume that this definitional

change is one of substance, for immediately after laying down the "serious ... value" criterion, the Court notes: "We do not adopt as a constitutional standard the *'utterly* without redeeming social value test' .... (Ibid.) The definitional change is also repeated, at the end of the *Miller* opinion, in the Court's summation of its holding in that case. (41 U.S.L.W. at 4931.)

That the existence of "serious ... value," rather than an "utter" lack of "redeeming social value" should be one of the three constitutional tests for obscenity was, so far as Petitioners are aware, not argued to the Court by any of the parties to the cases decided on June 21, 1973. Nor was this definitional change proposed by the Court itself to the parties as one to which they should give their attention in argument. These omissions are especially significant since, as the Court is aware, one definitional matter – "national" vs. "statewide" community standards – was argued extensively, and another question – the constitutionality of regulations applicable to "consenting," adults – was explicitly raised by the Court for the parties' attention when some of the cases were set down for reargument.

The issue at this juncture is not whether the "serious ... value" criterion is wide or workable. We argue in the next section of this brief that the "serious ... value" test is, at the least, exquisitely vague and that it raises the constitutionally intolerable spectre of providing First Amendment protection only for ideas and information desired by intellectually and aesthetically elite groups within our population. The issue is whether a major alteration in the constitutional test for obscenity – be it a good or bad alteration – should have been made by the Court *sua*

sponte, without notice or argument of any kind, and without the opportunity for full and perceptive consideration of the issues which adversary argument uniquely affords. We hope that, upon reconsideration, the Court will agree that such a change should not have been adopted, or until Petitioners' herein are given an opportunity to brief and argue the merits of the "serious ... value" test and the Court has had an opportunity to consider those arguments. The opportunity to address a question of law before it is decided is perhaps the most fundamental guarantee of fairness and legal accuracy which our adversary system offers. It would be distressing, to say the least, to see the Court deny it, the more so when the issue is the scope of the constitutional right of free expression.

II. Despite the Court's assertions to the contrary, the revised test for obscenity announced in *Miller v. California* demonstrably does not provide either "fair notice" or "concrete guidelines" regarding what may constitutionally be deemed "obscene." Since the Court's decisions in *Miller* and *Paris Adult Theatre v. Slayton* are explicitly premised on the *Miller* opinion's ability, for the first time, to bring adequate clarity into obscenity law, rehearing is required to consider whether – and how – adequate clarity can be obtained.

In its opinion in *Miller v. California*, the Court formally recognizes what everyone connected with obscenity law had known for years – that under the original formulation of *Roth v. United States*, 354 U.S. 476, the "three-part" plurality approach of *Memoirs v. Massachusetts*, 383 U.S. 413, and the "casual practice" of *Redrup v. New York*, 386 U.S. 767, it had been impossible to know with any adequate

degree of certainty whether material dealing with sex would be constitutionally treatable or "obscene" or whether it would be held to be expression protected by the First Amendment. The Court in *Miller* correctly concludes that a continuation of this condition of extreme vagueness in the line of demarcation between protected and unprotected speech on sexual subjects is constitutionally intolerable because of the lack of "fair notice" to producers of and dealers in sexually related material and the absence of "concrete guidelines" for prosecutors and state and lower federal courts. (413 U.S. 24)[2]

The explicit premise of the revised three-part test which the Court adopts in *Miller v. California* is that this new test – unlike *Roth*, or *Redrup* – will bring adequate clarity into

[2] In this respect, the *Miller* opinion is in full agreement with the national Commission on Obscenity and Pornography which, in its 1970 Report to Congress and the President (p. 40) found that under existing law:

> It is impossible for a publisher, distributor, retailer or exhibitor to know in advance whether he will be charged for a criminal offense for distributing a particular work, since his understanding of the three [*Roth-Memoirs*] tests and their application to his work may differ from that of the police, prosecutor, court or jury. This uncertainty and consequent fear of prosectuion may strongly influence persons not to distribute new works which are entitled to constitutional protection and thus have a damaging effect on free speech. These definitional problems are also cited by law enforcement officials on all levels as their chief difficulty in enforcing existing obscenity laws. There is, therefore, almost universal dissatisfaction with present law.

The Report of the Commission on Obscenity and Pornography is referred to at several places in this brief. A discussion of the Court's remarkable failure to allude to this Report in its *Miller* and *Paris Theatre* opinions is contained in Point VII of Argument I of this Petition.

obscenity law. This premise is, however, demonstrably wrong.

The Court appears to believe that adequate clarity will flow from the fact that the *Miller* test requires, for the first time, that obscenity laws be restricted to "works which depict or describe sexual conduct," which conduct is "specifically defined by the applicable state law". (413 U.S. at 24) But all works which depict or describe previously defined sexual conduct are obviously *not* obscene under *Miller* any more than under prior constitutional tests. The consequences of obscenity can constitutionally be visited on works only when, in addition to their treatment of defined "sexual conduct", they also appeal to the "prurient interest" in sex of the "average person", are "patently offensive" and lack "serious ... value." For the test of obscenity to be adequately clear it must be clear, therefore, not only which sexual depictions are initially covered by the law, but also which such depictions will additionally be found to be prurient, offensive, and lacking in requisite value. As we show immediately below, however, these requirements of the constitutional standard remain as intolerably vague under *Miller* as under all earlier formulations.

(1) *Appeal to the "prurient interest" of the "average person".* – The *Miller* opinion emphasizes repeatedly that only material appealing to a "prurient" interest in sex can be constitutionally regarded as obscene. This, indeed, is the basic definition of what is obscene originally adopted in *Roth*. (354 U.S. at 487). Yet the Court has never provided even the most rudimentary degree of guidance regarding what is a *prurient* sexual interest, as compared with other sexual interests which may be appealed to with full constitutional protection. The Court has attempted to define "prurient" on only one

occasion – the 1954 *Roth* opinion – and its treatment could hardly have been more confusing. In that case the Court said that material appeals to prurient interest if it has "a tendency to excite lustful thoughts." (354 U.S. at 487 n. 20) The Court also said (quoting from *Webster's* dictionary) that prurient was equivalent to "itching; longing; uneasy with desire or longing." (*Ibid.*) Finally, the Court referred with approval to the Model Penal Code definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." (*Ibid.*)

Now "lust" is simply not the same as "uneasy desire" or "longing," and surely none of these feelings is automoatically equivalent to "shame" or "morbidity". For example, a film which would cause a married person to feel sexual longing or desire – even lust – for his or her spouse would certainly not also cause feelings of shame or morbidity if the marriage relationship was even remotely normal. Must a producer or distributor of books or films on sexual subjects thus take care that his works not arouse lust in his readers or viewers, that they not cause uneasiness or longing, that they not cause shame or morbidity, that they not cause *all* of them at once, or what? The Court's opinion in *Miller* repeats and relies upon the term "prurient" numerous times, but it makes no attempt to describe which of these widely differing reactions it means to refer to. If there is to be "fair notice" and if there are to be "concrete guidelines" on the basic concept of pruriency, the Court is sure obligated to offer further – and more lucid – explanation of the meaning of prurient.

The lack of meaning and clarity in the concept of pruriency is, moreover, quite small in comparison to the utter impossibility of divining – as one must under *Roth-Miller*

– what will arouse the prurient interest (whatever that means) of the *average person.* If the *Miller* formulation is to offer adequate, definitional clarity, one would have to assume that there is some widely shared (and therefore generally known) "average" societal reaction to certain types of sexual materials. This assumption may once have been accurate. At a time when all materials with highly, explicity, sexual contents were either distributed "under-the-counter", or to extremely restricted and specialized audiences such as doctors and sex researchers, it may well have been true that a very broad spectrum of American shared a common and predictable reaction to such materials, and that this reaction was a "prurient" one (assuming that term to have a single and clear, rather than a multifaceted and contradictory meaning).

But it is common knowledge today that the most explicit sexual depictions in films and books sometimes draw a wide audience – often indeed, making the "best seller" lists – and that these audiences do not often exhibit signs of morbidity, shame, lust or sexual itching. At the same time, such materials have no appeal whatsoever for many other persons, while for still another group they are repulsive. Thus, the National Commission on Obscenity and Pornography, found, as the result of numerous studies into the evaluation by Americans of extremely explicit sexual materials, that there was "very little consensus among people regarding either the 'arousingness' or the 'offensiveness' of a given sexual depiction. A wide distribution of judgments ... occurs, for example, for explicit depiction of female nudity with genitals exposed, for explicit depiction of heterosexual intercourse, and for graphic depiction of oral-genital intercourse. In

addition, judgments differ among different groups: Males as a group differ from females . . . ; the young differ from the old; the college-educated differ from those with only a high school education; frequent church attenders differ from less frequent church attenders." (Commission Report, p. 41).[3] Put another way, "what may not be provocative to one person may well be to another." (*Rowan v. Post Office Dept.*, 397 U.S. 728, 737 [opinion for the Court by Chief Justice Burger]).

Which then among these wholly different and widely shared present-day judgments about and reactions to the most extremely explicit sexual materials is the reaction of the "average person"? The fact is, of course, that there no longer is any consensus or "average" reaction to explicit sexual materials, any more than it is possible to say whether the "average" American likes olives or ice hockey. Vastly differing tastes and reactions cannot be "averaged" like height and weight or family income.

The *Miller* opinion indeed recognizes that, taking the nation as a whole, "average" standards of taste and reaction regarding sexual materials are, as we have just shown, "hypothetical and unascertainable". (413 U.S. at 31). This fatal vice of vagueness is not cured, however, as the Court appears to suppose, by authorizing the application of state-wide, rather than national, standards. A state such as California, where the *Miller* case arose, contains fully as broad

---

[3] Petitioners are not aware of any contrary evidence or conclusions about the widely varying responses among Americans to explicit sexual depictions, either in the several dissents from the Commission Report, or elsewhere.

a spectrum of age, occupation, educational background, religious beliefs and non-beliefs – and reactions to explicit sex – as the nation as a whole. The *Miller* opinion correctly notes that "People in different States vary in their tastes and attitudes" (413 U.S. at 33), but tastes do not suddenly become uniform when one crosses a state border. People in the *same* state also vary in their tastes and attitudes. The reactions of the "average" Georgian to a sexual depiction are thus as "hypothetical and unascertainable" as the reactions of the "average" American. A test for obscenity which requires a prediction as to whether the nonexistent sexually "average" Georgian will have a "prurient" reaction to a given sexual depiction provides neither "fair notice" nor "concrete guidelines".

(2) *"Patently offensive, in light of contemporary community standards".* – Under the formulation offered by the Court in *Miller*, descriptions or depictions of sexual conduct, which appeal to the "average" "prurient interest", are nonetheless constitutionally protected unless they are, in addition, "patently offensive" in light of "community standards." We can assume that, if a publisher or distributor of books or films dealing with sexual conduct were to interview any individual about his reaction to a particular publication, it would be possible to tell whether that individual found the work, upon examination, to be "patently" offensive to himself. But how is a publisher or film distributor to tell whether his work will be patently offensive to a "community"?

In the first place, the Court has never defined what it means to say that a "community" finds a work offensive. The Court seemingly cannot mean to limit the concept to

situations where *every* member of the community is offended for, if so, the law of obscenity, as applied in *Paris v. Slayton, supra* to consensual distributions of materials would have effect only where it was wholly unnecessary (for surely "patent" offensiveness refers to such a high degree of dislike that only an abnormal individual would willingly purchase that which patently offends him). Does a "community" then find a work offensive within the meaning of *Roth-Miller* when a bare majority are repelled by it, when a substantial majority are repelled (say seventy or eighty percent) or only when there is an overwhelming consensus of repulsion (say ninety five to ninety nine percent)?

And even if an answer were given to these questions (the Court, however, has never offered one), the overwhelming problem of vagueness would still like in the necessity of determining, in advance, whether the requisite percentage of a given community will, in fact, be offended by a particular work, when the particular tastes and sensitivities of the members of that community cannot possibly be known to a publisher or distributor before he exposes himself to criminal liability. As noted above, in the discussion of the meaning of the "prurient" interest of the "average" person, all of the research carried out to date shows that, contrary to what the Court may have assumed, Americans are entirely unpredictable with regard to whether they find even the most "hard core" sexual depictions offensive or attractive and a substantial number do not take offense at any category of hard-core depictions. In addition, an extensive national survey of American public opinion undertaken by the Obscenity Commission showed that in 1970 approximately half of us believed that it was "all right" to have any and so called all hard core pornography available to adults who wish to read or

view such materials privately. (Commission Report, pp. 352-353) The materials to which this survey referred included pictures mainly for the purpose of showing sex organs, pictures of men and women having sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of homesexual activities, and even pictures of sex activities which include whips, belts, or spankings. Where in this blanket approval by a majority of the consensual distribution of the most explicit materials is a producer or distributor to find guidance about what particular book or film will actually offend the requisite percentage (whatever it is) of the community? In view of this data, it is difficult indeed to understand the Court's confidence that there is now "fair notice" regarding the line between the obscene and the constitutionally protected, so long as obscenity is made to turn on the "community's" sense of offense.

(3) *"Lacks serious literary, artistic, polical or scientific value."* – In footnote 7 of the *Miller* opinion, the Court explicitly "reject[s], as a constitutional standard, the ambiguous concept of 'social importance'." The Court adopts instead the concept of "serious ... value". What the Court does not explain – and what is, in fact, inexplicable – is why the concept of "serious ... value" is any *less* ambiguous as an independent test of obscenity than the rejected test of "social importance."

While the *Miller* opinion does not define the meaning of "serious" in its test, we may safely assume that "serious" is not intended as denoting the opposite of "humorous." (It is inconceivable that the Court means to disqualify a sexual comedy from constitutional protection, while affording constitutional protection to a tragedy with identical sexual content and literary or artistic merit). "Serious" value then,

must be the equivalent of "substantial" value. How is it any less "ambiguous" to require that a work be "substantial" in a literary, artistic, political or scientific sense, than to require that it be "important" socially? The two phrases would, indeed, appear to mean precisely the same thing.

The ambiguity in determining either the "substantiality" or "importance" of a contribution to literature, art, politics or knowledge is caused by the fact that there can never be expected to be any agreement among a broad segment of the population about what is substantial or important. A book which has substance for one person may have no utility for another, and *vice versa*. This is true with regard to sexual subjects, as well as any other subjects. A film detailing various positons of sexual intercourse may have no importance to a gynecologist, a pre-adolescent or a married person with extensive sexual experience, but it may be extremely valuable to a recently married young adult couple who are having difficulty making a satisfactory sexual adjustment. A sexual fantasy such as the masochistic "Story of O" may impress – as it did – the book reviewer for the New York Times as a work of great psychological importance, while it communicates little or nothing to a high school drop-out. A different sexual yarn may be trash to the New York Times and interesting literature to a blue-collar worker. If "serious ... value" requires that everyone see something of substance in a work then nothing has serious value. Nor, in a democratic society, can serious value be limited to what appeals to professional critics, college professors and the like. Joyce's "Ulysses" has serious literary value (we suppose the Court would agree) despite its explicit – and to many people offensive – sexual content, because a small minority of well-educated people read it and like it for its literary value to

them. By the same token, a book about sexual conduct, thoughts and adventures which a traveling salesman reads and likes for its literary value to him must also have serious value. The First Amendment is designed for the interests and tastes of everyone – not just those who operate on the frontiers of knowledge or who constitute the literary or artistic *avant garde.*

As in the areas of pruriency and offensiveness, the Court may thus have assumed in formulating its *Miller* opinion, that there is an ascertainable body of sexually oriented descriptions and depictions which are insubstantial aesthetic or educational works for virtually every American and, hence, without "serious ... value". If so, the Court was wrong. In one study done for the Commission on Obscenity, for example, couples married for 15 to 19 years viewed "hard core" pornographic films once a week for four weeks. More than 40% of the subjects of the study reported that exposure to these films resulted in increased openness in discussing sex with their spouse, more than 20% reported lowered inhibition toward their spouse, and about 15% reported increased satisfaction with marital sex life (Commission Report pp. 192-193). Surely these are serious values which the Court means to protect; yet they flow from the most hard core of sexual materials. Nor is the study just referred to an isolated phenomenon. The Obscenity Commission's national survey questioned a representative sample of the American public extensively about exceedingly explicit verbal and pictorial sexual materials, including material showing nudity with genitals exposed, heterosexual intercourse, mouth-sex organ contact, homosexual activity and sadomasochistic materials. Over 60% of those questioned believed that such materials provide information about sex, *and almost 40% of those questioned had either experienced this effect themselves or seen it in someone they knew personally;* almost half of these

questioned believed that such materials improve the sex relations of some married couples and *over one third had either experienced this effect themselves or seen it in someone they knew personally;* more than a quarter of those questioned believed such materials give relief to people who have sex problems; and almost half believed such materials to be a source of entertainment. (Commission Report pp. 157-160). The Court's failure to recognize the fact that substantial numbers of Americans find value in what the Court may believe to be the most "flagrant" sexual materials (*Kaplan v. California, supra*), and this Court's formulation of a constitutional test of obscenity based on precisely the opposite – and therefore factually, erroneous – assumption, has caused not clarity, but utter confusion, in the meaning and application of obscenity law.

* * * * *

To sum up, the Court in *Miller* has not, as it seems to have supposed, brought an adequate degree of clarity to the test for obscenity by requiring that obscenity law apply only to previously defined descriptions or depictions of sexual conduct. Many non-obscene works describe or depict sexual conduct. It is precisely once sexual conduct is the subject matter that clarity is needed in drawing the line of demarcation between obscenity and constitutional protection. But a producer or distributor, a prosecutor or judge or juror dealing with a work describing sexual conduct is faced under *Miller* with the impossible task of determining (a) whether the book or film in question is "prurient", when that term has never been meaningfully defined, (b) whether it is prurient to the "average" person, when there is no average in such matters, (c) whether it is patently offensive to the standards of the "community", when no one knows what percentage of the persons in a place set those community standards and when it is, in any event, impossible to guess what the

different members of heterogeneous groups of Americans will find offensive, and (d) whether it has "serious ... value", when every sexual depiction – even the most extreme – would appear to have value of some substantial sort for some persons and when the Court has never told us how many and what kinds of persons must detect such value to make it constitutionally cognizable. Nor, where speech is concerned, can it be left to future cases to build up a body of law which may or may not ultimately shed more and better ligh on the meaning of "prurient" and "average" and "community" and "serious", for in the meantime, men will go to jail who failed to guess the direction the law would take, while others will forbear from publishing constitutionally protected material for fear of guessing incorrectly. If we are to have "fair notice" and "concrete guidelines" we need them now, and the *Miller* opinion, despite its fervent and undoubtedly well motivated assertion to the contrary, demonstrably does not achieve these ends.

III. The Court has inexplicably, and contrary to all precedent, applied the same constitutional test for obscenity to materials distributed privately and consensually as to materials thrust upon unwilling recipients.

At the beginning of its opinion in *Miller v. California* the Court notes that: "This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials ... *It is in this context that we are called upon to define the standards which must be used to identify obscene material* that a State may regulate without infringing the First Amendment ..." (413 U.S. at 18 and 19, emphasis added). The Court then adopts the three-part constitutional standard (appeal to prurient interest;

patent offensiveness; lack of serious value) which is discussed in the previous section of this brief. In view of the Court's introductory statement, it is apparent that this three-part test is intended as the constitutional limit upon a state's power to impose sanctions upon the thrusting of sexual materials upon unwilling recipients.

The original *Paris Adult Theatre v. Slaton*, *supra* case unlike *Miller v. California*, did not involve application of obscenity prohibitions to invasions of privacy through the thrusting of sexually explicit materials upon persons who had indicated no desire to see them. The films in *Paris* were, on the contrary, exhibited only to adults who wished to see them, after being given "full warning ... of the nature of the films shown." (41 U.S.L.W. at 4936). Yet in *Paris* the Court holds that precisely the same constitutional test must be employed as the Court applied in *Miller* to limit the State's power to deal with non-consensual invasions of privacy.

In every previous case in which the Court has addressed the definitional standard for obscenity in the context of specific prohibitions – such as prohibitions upon offending the sensibilities of unwilling recipients, upon distribution to minors, or upon specialized modes of distribution constituting "pandering" – it has explicitly held that the States and the federal government have constitutional power to prohibit a significantly *greater* range of materials under such specific prohibitions than under laws which apply to consensual distributional conduct among adults. These cases are, indeed, all cited by the Court at the outset of its *Miller* opinion just after the Court notes the specific "thrusting" context of *(See 413 U.S. at 19). Thus in Ginsberg v. New York* (390 U.S. 629, 634), involving juvenile prohibitions, the Court noted that "the ... magazines involved in the sales here are not obscene for adults" but the Court nevertheless held it

constitutional for New York to prohibit these magazines from being sold to persons under the age of seventeen. In *Ginsburg v. United States* (383 U.S. 463, 465-466) the Court "agree[d] that the question of obscenity may include consideration of the setting in which the publications were presented" and it affirmed a conviction for "pandering" certain material while "assum[ing] ... that the prosecution could not have succeeded" if "pandering" had not been made out. And in *Rabe v. Washington* (405 U.S. 313, 317), the concurring opinion of Chief Justice Burger and Mr. Justice Rehnquist explicitly noted that at least one part of the prevailing constitutional test of obscenity in consensual contexts "has little relevance" "where the very method of display may thrust isolated scenes on the public."

In holding that the same constitutional definitional limits bind the States when they prohibit direct assaults on individual privacy as when they regulate consensual distribution of sexual materials the Court thus inexplicably flies in the face of every existing precedent. Even more importantly, the Court, with all respect, flies in the face of rudimentary common sense as well. Very different governmental interests underlie prohibitions of consensual distribution of sexual materials, on the one hand, and prohibitions against the non-censensual thrusting of such materials upon unwilling recipients, on the other. The Court in *Paris Art Threatre v. Slaton* justifies consensual prohibitions largely upon the grounds that they may be viewed as necessary to protect against deterioration of the moral tone of a community and to guard against the danger that exposure to sexual materials may possibly lead persons to commit anti-social conduct. (413 U.S. at 60). "Thrusting" prohibitions flow from neither of these interests, but from the individual sensibilities of some persons in our society against being

forced to confront sexual depictions when they do not want to do so. This interest, of course, has nothing to do with prohibitions upon private consensual activity. Since the interests which give rise to the two kinds of prohibitions are so different, it would be quite irrational, to say the least, to hold that the constitutional scope of such prohibitions – *i.e.*, the materials they may regulate – must be precisely the same.

Indeed, as the Court has held on several occasions, the Constitution permits a significantly broader class of sexual materials to be included in prohibitions against "thrusting" invasions of privacy then it permits to be included in prohibitions against consensual distributions. See, for example, not only the opinion of Chief Justice Burger and Justice Rehnquist in *Rabe v. Washington, supra,* but also Chief Justice Burger's opinion for the Court in *Rowan v. Post Office Department,* 397 U.S. 728, and the Court's per curiam opinion in Redrup v. New York, 386 U.S. 767, 769. This is true because materials which offend the sensibilities of some or even many may, at the same time, have substantial and serious value for others. Those who find important values in a sexual book or film can surely not be reduced to reading or seeing only what does not offend others more easily affronted than themselves, any more than the State in *Butler v. Michigan*, 352 U.S. 380, 383, could "reduce the adult population of Michigan to reading only what is fit for children."[4]

[4] The sensible rule that there is signficantly wider constitutional power to prohibit intrusive communications than to prohibit consensual ones is not limited in application to sexual materials. The same distinction lies, for example, behind the doctrine which permits prohibiton of face-to-face "fighting words" (while the same words are constitutionally protected in consensual contexts) and in the doctrine which

If, then, the three-part test of *Miller v. California* is, as the Court appears to hold in that case, the appropriate constitutional limit on a State's power to prohibit sexual materials in a context where they are aggressively thrust upon unwilling recipients, significantly stricter constitutional limits must apply against States when they seek to prohibit consensual distributions of sexual materials. On the other hand, if *Paris Theatre v. Slaton* correctly holds that the three-part *Miller* test is the appropriate constitutional definitional limit where consensual distributions are involved, then *Miller* confines much too narrowly a State's power to deal with deliberate "thrusting." Unless every case ever decided on the subject is to be discarded *sub silentio*, and unless plain reason is to be completely read out of constitutional obscenity law, the Court should grant rehearing to determine, at a minimum, which of these two logically and legally inconsistent cases is the correct one.

Upon reconsideration, it appears likely that the Court would conclude that the *Miller* test is, as *Miller* held, the proper type of limit where intrusive thrusting conduct is involved and that a different and narrower standard is needed if consensual distributions are to be constitutionally regulated. Except for its intolerable but perhaps curable vagueness, the *Miller* approach seems well suited to invasions of individual privacy. The second prong of *Miller's* three-part standard –

(Footnote 4 Continued)

permits loud and raucous amplification devices to be regulated or barred, when the identical message would be afforded full constitutional protection in a non-intrusive context. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Kovacs v. Cooper*, 336 U.S. 77.

patent offensiveness – is directly related to the desire to protect against intrusion upon individual sensibilities. If the "prurient interest" prong is read, as it might be, to relate to materials which cause uneasy or morbid or shameful feelings in some recipients, then that prong also is tailored to deal with offense to sensibilities. In that context, a "serious ... value" criterion may also make good sense – if such values are actually present it would seem appropriate to find that they count more heavily in the constitutional scale then offended feelings.

On the other hand, the reasons upon which the Court relies, in *Paris v. Slaton,* to legitimate prohibitions upon consensual distributions of sexual materials are reasons going mainly to the preservation of morality and the desire to prevent sexual material from contributing to anti-social conduct. A proper constitutional test here would not turn on offensiveness or pruriency – for these elements, whatever they mean, heaven't the slightest relationship to the supposed evils involved – but would require the finder of fact to determine whether the materials at issue have, in fact, been sufficiently proved to contribute to immorality or crime. Upon reconsideration of the novel concepts of constitutional judgment applied by this Court in the five (5) obscenity cases decided June 21, 1973, on which the Georgian Supreme Court predicated it's decision in the case at bar, this Court would have the opportunity to adopt a constitutional definition of "obscene" for consensual distributions which reflect the State interests – if any – which support prohibition of these distributions.

IV. In holding that "obscene" material is "unprotected by the First Amendment", the Court relies upon historical "facts" which are untrue and irrelevant. Absent this false historical premise, there is no basis for holding that certain materials on sexual subjects are, because of their explicit contents, undeserving of the constitutional protection afforded to other pure speech.

A. *History does not support exception to the First Amendment for material which Miller v. California defines as "obscene."*

Miller v. California (413 U.S. at 29) states that the power to prohibit obscenity is a power which the States "have enjoyed and exercised continuously from before the adoption of the First Amendment to this day." This is untrue. The historical background of obscenity prohibitions is set forth both in the Report of the Commission on Obscenity and Pornography (pp. 296-302) and in this Court's opinion in *Roth v. United States*, 354 U.S. 476, 482-483. There is no disagreement on the essential facts and they ary not as the Court describes them.

It is difficult to understand what evidence the Court relies on in asserting in *Miller* that the States "exercised" the power to prohibit "obscene" materials "from *before* the adoption of the First Amendment." The fact is that only one of the American Colonies – Massachusetts – had anything resembling an obscenity statute prior to the adoption of the First Amendment, and even this law, which was directed at religious blasphemy, appeared to apply not to "obscene" sexual materials as such, but only to such materials when "in imitation or in mimicking of preaching, or any other part of divine worship." Province Laws, 1711-12, ch. 6, Section 19.

There were no recorded prosecutions of sexual materials under this Massachusetts Statute until 1821. Contrary to the Court's statement, every other colony left sexual materials entirely unregulated by the criminal law. The first state obscenity statute was enacted by Vermont not before the First Amendment, but in 1821. Statutes in other states followed slowly over the next 80 years. The first effort – in either the colonies or the states – to use the common law against obscenity occurred in Pennsylvania in 1815, 24 years after the First Amendment. There was another prosecution under the common law and the Massachusetts Statute 6 years later.

The facts are, then, that *no* state exercised the power to prohibit sexually "obscene" materials "before the adoption of the First Amendment," that tentative state efforts in that direction were first commenced more than two decades after the Amendment was adopted, and that obscenity prohibitions in the United States did not become commonplace until 50 or more years after the First Amendment. (See Commission Report, p. 301) Moreover, the first federal obscenity statute was enacted in 1842 (5 Stat. 566) – it prohibited importation but applied only to pictorial materials. Obscenity was not prohibited in the federal mails until 1865, 74 years after the First Amendment (13 Stat 507).

Thus the states plainly did not "exercise" the power to prosecute "obscene" sexual materials before the adoption of the First Amendment or even shortly after its adoption. The Court's companion assertion that the States "enjoyed" this power prior to the First Amendment is equally puzzling. The Court, perhaps, assumes that the common law, although not actively applied in the United States against obscenity, still

recognized the distribution of obscene sexual materials as an offense prior to 1791. This assumption on the Court's part would be totally unfounded. In the absence of reported American obscenity cases, the common law in the colonies on the subject was presumably the same as the common law as it existed in England prior to American independence. Contrary to what many people may suppose today, Eighteenth Century English common law did *not* hold sexual obscenity to be indictable. Quite to the opposite effect, it was authoritatively established in 1708 (*Queen v. Read*, 11 Mod. Rep. 142) that the distribution of "bawdy" sexual materials did not constitute an offense.[5] During the Eighteenth Century, sexual materials were punished in England only if they attacked religion. (*King v. Curl*, 2 Stra. 788 ("Vensus in the Cloister or the Nun in her Smock"); *Rex v. Wilkes*, 4 Burr. 2527; *King v. Gallard*, W. Kelynge, p. 162.) The Obscentiy Commission Report (p. 299) comments that "some very sexually explicit books and pamphlets of the type often referred to today as hard-core pornography circulated quite freely in England throughout the 18th Century, apparently because their lack of anti-religious content kept them outside the law's proscription."

The Court is thus wrong to suppose that the framers of the First Amendment must have understood an exception to the freedoms of speech and press in the case of certain explicit sexual materials which might be regarded as

[5] The work involved in *Read* was "The Fifteen Plagues of a Maidenhead." The court held the book to be "bawdy stuff," but since it libelled no one, did not reflect upon the government and did not attack religion, it was held to be "punishable only in the spiritual court."

"obscene." Some of the framers may privately have harbored such a view, but they could not have based it on existing law at the time, for these simply was no such law. The wide-spread notion that certain explicit sexual depictions or descriptions are "obscene" and unlawful is largely a product of Victorian times. That concept was unknown to Anglo-American law at the time of the Revolution and the framing of the Constitution.

While the Court is thus in error regarding the legal status of explicit sexual materials at the time of the adoption of the First Amendment, it may perhaps believe that materials which fall under the *Miller* definition of obscenity can nevertheless be regarded as "outside" the First Amendment on the basis of a long period of years during which such materials have been outlawed. It is true that sexual obscenity prohibitions, while they neither predate nor were contemporaneous with the First Amendment, do go back 100 years or more in most American jurisdictions. But there are two insuperable difficulties in using these years of history to establish an exception to the First Amendment for what *Miller* today defines as "obscene." In the first place, to establish an exception to a constitutional guarantee through years of recognized practice, one would suppose that that practice would have ultimately to be recognized as having constituted a *constitutional* course of action. Yet for virtually all of the years during which obscenity laws were commonplace in America prior to this Court's 1954 *Roth* decision, there laws were plainly *unconstitutional*. They used, as their test of obscenity, the standard of the 1868 English case of *Regina v. Hicklin*, L.R. 3Q.B. 360. In *Roth*, this Court for the first time considered

the constitutional status of obscenity law under *Hicklin*. To held that the *Hicklin* test "must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489.[6] An exception to the First Amendment is not established through an "unconstitutionally restrictive," albeit widespread, practice.

Secondly, even if years of unconstitutional practice under *Hicklin* could magically be transformed into a constitutionally reputable exception to the First Amendment, the fact is that *Hicklin* prohibited a wholly different category of sexual materials from that prohibited under the *Miller* three-part formulation. *Hicklin* prohibited a whooly different category of sexual materials from that prohibited under the *Miller* three-part formulation. *Hicklin* applied to books and pictures which have a tendency "to deprave and corrupt those whose minds are open to such immoral influences and into whose hands ... [they] may fall." It is quite clear that a book or film could tend to "deprave or corrupt" particular readers or viewers without appealing to the "prurient interest" of the "average person" in a patently offensive way, while lacking "serious ... value." For example, a film extolling the virtures of adultery but depicting no sexual conduct would likely violate *Hicklin*, but could not possibly be "obscene" under *Miller*. On the other hand, it is equally clear that a work may fit the *Miller* criteria without tending to deprave or corrupt anyone. In many ways, *Hicklin* is a much *narrower* test than *Miller*, for it requires a finding that the particular work in question will actually have a lasting and seriously adverse behavioral or psychological impact upon some persons

[6] See also the Court's reference in *Miller* to the "now discredited test in *Regina v. Hicklin*." (413 U.S. at 33).

who read or set it. *Miller*, on the other hand, places its emphasis on pruriency, offensiveness and lack of value – traits which may easily exist without any danger of corruption or depravity to anyone.

To hold that the sexual materials, which *Miller* defines as obscene, are outside the First Amendment because quite different sexual materials defined by *Hicklin* were once thought to be outside, the First Amendment is to defy logic. It is as if the Court had held (as it did not) that because one form of financial aid to religion – say tax exemptions on Church property (see *Walz v. Tax Commission*, 397 U.S. 664) – was constitutional because of years of recognized practice, another different form of aid – say direct supplements to religious school teachers' salaries (see *Lernon v. Kurtzman*, 403 U.S. 602) – was also constitutional because it, too, was "state financial aid to religion." *Hicklin* and *Miller* are wholly different concepts of "obscenity," albeit they both relate to materials on sexual subjects. Even if obscenity as defined in *Hicklin* were established as being "unprotected by the First Amendment," it would take a fresh set of arguments – not merely reliance on history – to show why obscenity as defined by *Miller* should also be "unprotected." And of course it is now established that obscenity as defined under *Hicklin* was, in fact, not unprotected by the First Amendment at all. Whence, then, the Court's bland assertion in *Miller* that "This much has been categorically settled by the Court, that obscene material [as defined by *Miller*] is unprotected by the First Amendment." (413 U.S. 23).

B. *Absent the Court's false historical prop, there is no basis for treating sexual materials defined by Miller as "obscene" as unprotected by the First Amendment.*

The Court's finding that the sexual materials defined by *Miller v. California* are unprotected" by the First Amendment is at the heart of its holding, in the cases decided on June 21, 1973, that such materials may be completely prohibited from consensual distribution to adults. If the materials defined by *Miller* were deemed "protected" by the Amendment – as, for example, is the case with offensive but non-erotic speech (*Cohen v. California*, 403 U.S. 15) and non-malicious libel of public officials (*New York Times Co. v. Sullivan*, 376 U.S. 254) – *then it is extremely doubtful that anyone would seriously suggest that the requisite "clear and present danger"* existed to justify prohibition of consensual transactions in such materials. Certainly neither the Court as a whole nor any individual Justice in any of the obscenity cases during the last two decades has argued that a clear and present danger could be traced to "obscene" materials as *Miller* defines them. Quite to the contrary, *Roth* found a "complete answer" to the contention that obscene material creates no clear and present danger in its holding, not that such a danger exists, but that obscenity "is not protected speech." 354 U.S. at 486.

We have shown above that history does not provide a basis for determining that the specialized class of sexual materials described in *Miller* is "not protected speech." The fact is, however, *that the Court has never relied upon anything except history in assuming that 'obscenity is constitutionally unprotected.* Cases since *Roth v. United States* have relied exclusively on *Roth* in parroting that constitutional dictum and *Roth*, in turn, placed all its reliance upon the untrue assertion that obscenity prohibitions predated the First Amendment and the irrelevant fact that unconstitutional obscenity provisions employing the *Hicklin* standard had existed for many years. (See 354 U.S. at

481-485.) If the Court were merely reaffirming *Roth* today, it would perhaps be justifiable for it to ignore *Roth's* massive historical and logical errors and accept the constitutional conclusion which *Roth* based upon those errors. But the Court in *Miller* propounds a substantially different definition of what is "obscene" from that used in *Roth* (nowhwere does *Roth* restrict obscenity laws to sexual conduct or refer to either "patent offensiveness" or to "serious literary, artistic, political or scientific value"), while recognizing that *Roth's* rule was not constitutionally viable because of its failure to provide either "fair notice" or "concrete guidelines" regarding the limits of the First Amendment. If we are, as *Miller* proposes, now for the first time to have constitutionally valid obscenity laws, the Court should wish these laws to be based upon sound premises.

The recent history of the concept of pure speech which is "unprotected" by the First Amendment even in a consensual context has not been a happy one. As examples of such "unprotected" speech, for example, the *Roth* opinion cited blasphemy, profanity and libel, in addition to obscenity. (354 U.S. at 482-483). Blaphemy, however, was held constitutionally protected by the First Amendment in *Burstyn v. Wilson,* 343 U.S. 495, and profanity was afforded similar protection in *Cohen v. California,* 403 U.S. 15. A much stronger case can be made for withdrawing constitutional protection from libel, for defamatory statements constitute a real and often extremely harmful injury to another human being. Yet even here it is no longer remotely accurate to say that libel is "unprotected" by the First Amendment. Under New York Times Co. v. Sullivan, *376 U.S. 254, and Rosenbloom v. Metromedia, Inc., 403 U.S. 29, libel is* afforded full constitutional protection in many, if not most,

of its manifestations. Perhaps the only area where it is any longer accurate to describe speech as "unprotected" by the First Amendment is that of commercial fraud, deceit and misrepresentation, and the very closely related areas – such as the "blue sky" laws to which the Court refers in *Paris Theatre* – where lack of truth or full disclosure is penalized in connection with the sale of goods or securities. Like libel, these types of speech all involve a great and demonstrable threat of immediate harm to another individual – i.e., the person to whom the speech is directed. These types of prohibitions are so different from obscenity laws that the Court in *Roth* did not even think to mention them as examples of "unprotected" forms of expression.

If a category of speech relating to sexual subjects, which speech does no demonstrable harm to any individual or group, is now to be wholly excluded from First Amendment protection because of the manner in which the sexual subject matter is treated, that doctrine would constitute a distinct – indeed a unique – constitutional anomaly. What *reason* is there to say that, merely because words or pictures treat sexual conduct in a way which the average person finds prurient, offensive, and without "serious" value, they are no longer to enjoy the constitutional protection which the First Amendment affords to all other words or pictures which do no demonstrable immediate harm? Sexual conduct is certainly as legitimate a topic for books or films as any other form of human conduct. See *Roth v. United States*, 354 U.S. at 487: "The portrayal of sex ... is not itself sufficient reason to deny material the constitutional protection of freedom of speech or press." Explicitness regarding a legitimate subject of interest is surely not itself an evil. Why then do explicit portrayals of sex need to find favor – even "serious" value

– in the eye of the average person to qualify for constitutional protection? The First Amendment is neither designed nor needed to protect what the average person finds benign or useful. Such speech is in no danger of suppression in any event. The great function of the First Amendment is to protect expression which the average person finds distasteful, disturbing and without value, yet that is precisely the speech which, when it involves explicit sex, the Court in *Miller* holds "obscene" and "unprotected." Conformity of treatment and taste is required in sexual subjects and nowhere else. Why?

Despite the Court's repeated protestations to the contrary, one suspects that the answer to these nagging questions about sex and the First Amendment is that a majority of the Justices believe that sex – unlike all other topics – needs to be treated in what most people consider a decorous manner to come within the constitutional guarantees. The Court in *Miller* applauds the recent "striking [of] layers of prudery from a subject long irrationally kept from needed ventilation." (413 U.S. at 36)). If this is indeed beneficial, then it is time to strike the last irrational, and most harmful layer of prudery – the need to confine sexual expression within a mold which the "average" person finds acceptable in order for that expression to see the light of day. "Civilized people" (see *ibid.*), do not demand conformity of taste in the treatment sexual or any other controversial topics as the price of being permitted to communicate.[7]

[7] The Court attempts to justify the limited scope which it gives to the First Amendment in the area of sexual communication by stating that "the First Amendment protects works which, taken as a whole, have serious literary, artistic, policial or scientific value" *Miller v. California*, 413 U.S. at 36-37) and by noting that the material defined in

V. The Court's attempts to distinguish *Stanley v. Georgia* are unavailing. Either that case must be overruled, or the constitutional right to obtain sexual materials for private reading or viewing must be recognized.

A. As noted above, the crux of the Court's opinions of June 21, 1973, is the holding that "obscene material is unprotected by the First Amendment." In *Stanley v. Georgia,*

(Footnote 7 Continued)
Miller as "obscene" "by definition" lacks any such value. *(Paris Theatre v. Slaton.)* The Court offers no citation for the proposition that the First Amendment only protects works found to have ',serious ... value" and that is not surprising, for thy law is quite the opposite. "This right to receive information and ideas, *regardless of their social worth* ... is fundamental to our free society." *Stanley v. Georgia,* 394 U.S. 557, 564 (emphasis added.) "Though we can see *nothing of any possible value* to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York,* 333 U.S. 507, 510 (emphasis added). " *'Wholly neutral futilities* ... come under the protection of free speech as fully as to Keats' poems or Dunne's sermons.' " *Cohen v. California,* 403 U.S. 15, 24 (emphasis added).

The Court makes the mistake of equating the *purposes* of the First Amendment with the *application* of that Amendment to specific materials. It may well be that the purpose of the First Amendment is to protect that which has value – even "serious" value – for our society. But serious value cannot be the *test* under which First Amendment protection is conferred or withheld because that would give to judges an; jurors the power to ban speech because *they* could not perceive its value. That kind of censorship is precisely what the First Amendment is designed to stop. History is replete with examples of totalitarian censorship of materials which a majority at the time found worthless or harmful. The

394 U.S. 557, 559 n. 2, appellant was prosecuted for possession of material which the Court assumed was "obscene under any of the tests advanced by members of this Court." *Stanley* held, in the context of a prosecution for possession of such obscene material, that "If the *First Amendment* means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." 394 U.S. at 565 (emphasis added). If the First Amendment protects the right to read or see obscenity in the circumstances of the *Stanley* case, it simply cannot be true, as the Court states, that obscenity is "unprotected by the First Amendment." Nor can the protection which the First Amendment thus affords to obscenity (unless *Stanley* be overruled) be limited, as the Court suggests, to "a place, the home." (*Paris Theatre v. Slaton*, fn. 13) As the Court recognizes in *Miller v. California*, quoting from *Roth*, " 'The protection given speech and press was fashioned to assure unfettered *interchange* . . . .' " The framers certainly did not contemplate that the "interchange" they meant to protect would occur exclusively in people's homes – in secret cell meetings or the like. If a given "obscene" book or film is thus protected by the First

(Footnote 7 Concluded)

only way in which we can insure that all ideas which may ultimately have value will be free to circulate – and thus guard ourselves against totalitarian orthodoxies – is to refuse to judge officially the value or worth of individual books or films, but to leave that question to the author and his readers. These are not new ideas conjured up by amicus – they are the most fundamental tenets of our democratic heritage. The Court will perform a most dangerous disservice to our Constitution if it leaves outstanding the notion that the First Amendment is only available to those who can prove to the rest of us that his book or film has "serious value."

Amendment when read or viewed in the home by a solitary individual – as *Stanley* holds – then it is *a fortiori* protected by the First Amendment when it is part of an interchange between human beings, in the home or elsewhere. The Court, we believe, has an obligation to confront and remove these basic contradictions between its opinions of June 21 and the *Stanley* decision.

B. Contrary to the explicit language of *Stanley*, the Court reads that case as dealing exclusively, not with the First Amendment, but with a right of "privacy" which the Court believes can logically and tenably be confined to "the home." Even if the Court were correct in viewing *Stanley* as dealing only with privacy, and even if the Court were additionally correct in finding that *Stanley's* right of privacy – to read or see any sexual materials, including those which might be defined as "obscene" – could somehow be rationally confined to the home (a contention which we take up below), the Court would still be seriously and demonstrably in error in holding that a person does not have a constitutional right to obtain sexual materials outside the home in order to exercise his limited privacy right within that enclave.

One need look no further than *Griswold v. Connecticut*, 381 U.S. 479, the fountainhead of the modern constitutional right of privacy, to see why this is so. *Griswold* recognized a constitutional right of privacy in the *use* of contraceptives by married persons. But the defendant doctors in *Griswold* were not prosecuted for using contraceptives, they were prosecuted for giving information and advice intended to aid married persons in exercising their constitutional right of privacy to use contraceptives. The Court held that the defendants in *Griswold* had standing to raise the rights of contraceptive

users who were their patients, and it *then went on to thold that the constitutional privacy rights of married users of contraceptives were infringed by the prosecution of persons for facilitating that use.* See also *Eisenstadt v. Baird,* 405 U.S. 438, which reaches an identical conclusion.

There is an exact parallel between *Griswold* and the prosecution of a distributor of allegedly "obscene" sexual materials who sells these materials to a customer who wishes to obtain them for purposes of reading or viewing the materials in the privacy of his own home. In *Griswold* the *user* of contraceptives had the constitutional privacy right, but the prosecution of one who aided or facilitated the exercise of that right (the aid was, incidentally, only given for a fee in most cases) was held to be unconstitutional because it constituted an interference with the right of the user. In the obscenity stiuation, the customer who buys sexual materials has a constitutional right of privacy under *Stanley* to read those materials in his home. The prosecution of one who seeks to facilitate the customer in exercising his privacy right, by selling him the materials he wishes, must also be unconstitutional as constituting an interference with the customer's privacy right. Indeed, the interference with the recognized right of privacy through prosecution of one who facilitates constitutionally protected use is much greater in the obscenity situation than in the case of contraceptives. The inability to obtain a doctor's advice and information would not, presumably, wholly prevent a person from using contraceptives, if he so wished. But the constitutional right in *Stanley* is to read books and see films *which are written and produced by others.* Unless the Constitution protects the right to obtain such books and films, the right which *Stanley* recognizes is a legal nullity.

Thus, once the Court assumes, as it does in *Paris Theatre v. Slaton* (413 U.S. at 49), that distributors and sellers of sexual materials have "standing to assert potential customers' rights," it cannot permit prosecution of a vendor of sexual materials for private use (as it does in *Kaplan v. California*, supra without overruling *Stanley* or *Griswold* or both. Again some explanation of these contradictions is urgently required.

C. Finally, reason and logic simply will not permit the Court's attempt to limit the right recognized in *Stanley v. Georgia* so that that right is exercisable only within "the home." At a minimum, the *Stanley* right to read or view whatever sexual materials one wishes must extend to other places where people traditionally repair when they wish to read books or see films – to libraries, to park benches, to the shade of an oak in a favorite meadow or the dunes of a favorite beach and, in the case of films, theater or lectures, to theatres and auditoriums which are the only places where such works are ordinarily accessible. The Constitution does not require that readers be recluses.

We fully agree with the Court that there is often a necessity for "line drawing' familiar in the judicial, as in thy legislative process: 'thus far but not beyond.' " (*United States v. 12 200-Ft. Reels*, 413 U.S. 125, 126). But unlike legislative line drawing, which may legitimately be done for political, experimental and numerous other reasons which flow from expediency rather than principle, judicial line drawing bears a special responsibility. The lines here must respect and flow from the reasons for the underlying rule of law. Judges do not have the legitimate power to say "thus far but not beyond" unless they can relate that limitation to underlying principles. Judges, in short, cannot be arbitrary. That is the nature – and genius – of the judicial process.

To make the right of *Stanley* applicable only in the home is wholly to ignore the principle which the *Stanley* opinion set forth as that which gave rise to that case. *Stanley* is based upon the holding that "the Constitution protects the right to receive information and ideas." 394 U.S. at 564. "This right to receive information and ideas, regardless of their social worth" is, said the Court "fundamental to our free society." (*Ibid.*)[8] It is true that *Stanley* arose in the context of a prosecution for receiving information and ideas within the confines of the defendant's home, and that the Court reiterates that fact repeatedly in its opinion, and even describes it as giving "added dimension" to the underlying right to receive. That kind of careful statement of the ruly of law in the particular factual context is a judicial commonplace, especially when, as in *Stanley*, new ground is being broken. A court cannot be clairvoyant. A principle which appears correct in the context before the court may not apply to other contexts not before it, hence the statement of principle is made no broader than necessary to decide the case at bar. The limited statement of holding in

---

[8] *Stanley* was not, as thy Court asserts, merely "a reaffirmation that 'a man's home is his castle.' " (413 U.S. at 66). If that were the basis of *Stanley*, it would apply to *any* possession crimes within the home. Yet the *Stanley* court explicitly noted that "what we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms or stolen goods, a crime." 394 U.S. at 568 n. 11. The difference, said thy Court, is that "no First Amendment rights are involved in most statutes making mere possession criminal." (*Ibid.*) That is, most invasions of the "castle" do not involve "the right to receive information and ideas" upon which *Stanley* is based.

these circumstances is not a holding that the principle is inapplicable in other settings, it is merely a holding that the principle is *at least* applicable on the facts before the court.

Thus when a new case arises, where the principle found previously valid is asserted to apply in a new factual context, the court cannot simply say, of the prior holding, "thus far but not beyond." It has, instead, to decide whether the principle previously found applicable in one setting is, in actuality, equally applicable in the new setting. In the cases decided on June 21, 1973, the Court was therefore obligated to decide whether the "right to receive information and ideas, regardless of their social worth" which the Court in *Stanley* found "fundamental to our free society" when exercized in the home, is any less fundamental when exercized in a library, on a park bench, or in a theater. The opinions are totally devoid of any such analysis.

The right to receive information does not easily limit itself to one exercisable only within the confines of the citizen's home. In these days of radio and television it is true that much information is received directly into the home, but it was not always so, and we cannot imagine tha the Court means to limit the right to receive information to data flowing exclusively through those two media. To get facts and ideas elsewhere, a person inevitably must leave his home, or send another on the mission for him; and even once in possession of a book, a person may simply prefer to do his reading in the open air. This is not to say that, outside the home, the right to receive information may not be subject to certain restrictions, for example that in receiving information of one's choice one does not thrust or force that information upon others who do not wish to receive it. But the Court

held on June 21 not that there could be reasonable restrictions on the right to receive allegedly "obscene" sexual materials outside the home, but that there was no right to receive or study those materials, in any circumstances, beyond one's doorstep. The Court owes some explanation about why, in a highly mobile and socialized society, a right to receive and study communications from others is not recognized except in the particular place where one happens to live.

VI. Even if the Court were correct in holding that the consensual distribution of certain sexual materials is protected neither by the First Amendment nor by the right of privacy, the Court nevertheless offers no tenable basis for prohibiting such distributions.

Having held that the consensual distribution of "obscene" sexual speech, as defined in *Miller v. California*, is protected neither by the First Amendment nor the constitutional right of privacy, the Court holds that there are "legitimate State interests at stake" in prohibiting such distributions to adults. (*Paris Theatre v. Slaton*, 413 U.S. at 57). The Court appears to rely upon four separate state interests. In fact, none of them affords a legitimate basis for prohibiting consensual distributions of sexual materials.

A. The Court refers to the "tide of commercialized obscenity" (413 U.S. at 57) and "crass commercial exploitation of sex" (413 U.S. at 63). If the distribution of obscenity were harmful, then of course its commercial distribution would be as harmful as non-commercial distribution. But the commercial nature of an activity does not, in and of itself, make the activity harmful. "It is of course no matter that the dissemination takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 150.

Nor can we understand the basis for or relevancy of the Court's characterization of the activities of the Paris Theatre as "crass" or of the marketplace in sexual materials as a "tide." The Paris Theatre simply showed films for an admission charge, and the volume of sexual materials is quite small as compared to the volume of books and films generally. (See Obscenity Commission Report, pp. 7-19.) If it is "crass" to charge admission to a film on a sexual subject, is it equally "crass" to charge admission to a western adventure film or a musical comedy? Does the Court believe there is a "tide" of commercialized detective novels? These unseemly epithests hardly aid analysis or provide a basis for the regulation of human conduct.

B. The Court asserts that "the legitimate interest in preventing exposure of juveniles to obscene materials cannot be fully served by simply barring juveniles from the immediate physical premises of 'adult' bookstore, when there is a flourishing 'outside business' in these materials." (*Paris Theatre v. Slaton*, 413 U.S. at 58 n. 7.) The Court thus seems to assert that sales of sexual materials to adults may be prohibited for the purpose of keeping these materials from children, when the materials may be harmful to children but are not harmful to adults. This assertion was squarely rejected by a unanimous Court in *Butler v. Michigan* '352 U.S. 380, 383 (opinion by Mr. Justice Frankfurter), where the Court noted that its unconstitutional effect would be "to reduce the adult population of Michigan to reading only what is fit for children." Many substances may be unsuitable or unfit for children and there is often no way to be absolutely certain that, once sold to adults, they may not find their way into the hands of minors. So far as we are aware, this has never before been thought to justify their total prohibition and

their consequent deprivation to the whole adult population. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan, supra,* at 383.

C. The Court appears to hold that states may prohibit sexual materials in the interest of preventing crime and anti-social behavior. (413 U.S. at 57-59.) The Court's reasoning is in two parts. First, the Court states that, based on empirical evidence, "there is at least an arguable correlation between obscene material and crime." (413 U.S. at 58.) Then the Court argues that, apart from any evidence, a state may assume that, since "good books, plays and art lift the spirit, improve the mind, enrich the human personality and develop character" it follows that obscene books "have a tendency to exert a corrupting and debasing impact leading to anti-social behavior." (413 U.S. at 63.)

(1) The Court's argument that there is an "arguable correlation" between obscene material and crime is remarkable in its failure even to allude to the findings on this subject of the majority of the Commission on Obscenity and Pornography. This Commission was created and funded by Congress. Its members were appointed by the President of the United States. Its main delegated function was "to study the effect of obscenity and pornography upon the public . . .and its relationship to crime and other antisocial behavior." (P.L. 90-100; 81 S. Ct. 253, 254). After two years of study, which included a thorough study of all existing research as well as a substantial amount of new research, the *unanimous* Effects Panel of the Commission, composed of eminent social scientists (not one of whom had any connection whatsoever with the sexual materials industry) concluded that "If a case is to be made against 'pornography' in 1970, it will have to

be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults." (Commission Report, p. 139). The full Commission agreed with this finding (Report, p. 27). There were but 4 dissents (out of 18 Commission members) to the recommendations which were based upon it, and no explicit dissents from the finding itself. (Report, pp. 27, 52).

While wholly ignoring the unanimous conclusion of the Obscenity Commission that there is no reliable evidence showing a correlation between sexual materials and crime, the Court chooses to rely instead upon a dissent written by two Commission members for the proposition that there is an "arguable correlation." Neither of these dissenters was a social scientist and both had long-term and continuing commitments to groups dedicated to the elimination of explicit sexual materials from our society. (See Commission Report, pp. 635, 637-638.) The dissent attacks the veracity and motives of the majority Commissioners' finding that no correlation between obscenity and crime can be established. Perhaps the majority *is* incorrect, but the Court – if it believes in the power of truth – is certainly not entitled to so conclude on the mere say-so of two dissenters, without some independent critical examination of the extensive research and data upon which the majority's conclusions were based. The Court seems to be saying, in effect, that if *anyone*, no matter what his biases and preconceptions, concludes contrary to all the evidence and the conclusions of a body created by Congress to study the question, that obscenity may cause crime, then States are

constitutionally entitled to act on the assumption that it does. The Court might as well completely abandon any requirement that legislation have a rational basis.

The Court, moreover, even misrepresents the position of the two Obscenity Commission dissenters upon whom it purports to rely. These men did *not* assert that there was a correlation – "arguable" or otherwise – between obscenity and crime. Their position was quite the opposite: "We believe it is impossible, and totally unnecessary, to attempt to prove or disprove a cause-effect relationship between pornography and criminal behavior." (Hill-Link Minority Report, p. 386). They stated further: "The government interest in regulating pornography has always related primarily to the prevention of moral corruption and *not* to prevention of overt criminal acts and conduct." (Report, p. 385 [emphasis in). The Court does not explain how these assertions of the irrelevancy and impossibility of showing a correlation between obscenity and crime can be used to establish that such a correlation "arguably" exists.

The Court writes about the question of a correlation between obscenity and crime as though it had never previously considered the issue.[9] In *Stanley v. Georgia,*

[9] The Court does rely upon a *dissenting* opinion by Mr. Justice Clark, written in 1966, that some doctors believe that obscenity causes crime. This opinion was written four years before thy Obscenity Commission Report on the subject, which thy Court has chosen to ignore. Justice Clark's conclusions were, moreover, subsequently rejected as a basis for obscenity regulation by the majority of the Court in *Stanley v. Georgia,* as discussed in the text.

however, the Court addressed the assertion by the State "that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." The Court noted that "there appears to be little empirical basis for that assertion." The Court then concluded that, "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." (394 U.S. at 566, 567.) The Court in *Stanley* thus rejected, as a basis for regulation of "obscene" materials, the precise "arguable correlation" upon which the *Paris Theatre* opinion relies. The Court in *Paris Theatre* does not explain why the correlation is any more validly "arguable" today than it was in 1969.

(2) The Court's assertion that since "good" books have good social effects, "obscene" books may be presumed to lead to antisocial behavior is a *non-sequitur.* For this statement to have any meaning, it would have to be assumed that all books fall into one of two mutually exclusive categories – "good" and "bad" – and that obscene books were inevitably "bad". That books are inevitably either "good" or "bad" is, however, patently untrue. Many – perhaps most – books are neither "good" nor "bad", they neither uplift nor corrupt, they merely entertain or pass the time. What, then, is the basis for the Court's assumption that "obscene" books must be bad, rather than morally neutral or even good? Only one supposes, the Court's belief that obscene books have had effects. That, however, is the very question at issue. In the absence of any *evidence* that obscene books have had effects, the Court cannot establish

that they have had effects through a syllogism which begins by assuming, without any evidence, that they have bad effects.[10]

D. The Court asserts that states may prohibit private consensual distributions of sexual materials in order to protect the "'tone of the society'" and to "'maintain a decent society.'" (413 U.S. at 59.) The fallacy in this assertion is the same as the fallacy in the Court's reliance upon the assumption that "obscene" books are "bad" books. Granted that society may maintain "decency" and an appropriate level of "tone". But in the absence of evidence that "obscene" sexual materials have any bad effects whatsoever, what is the basis for concluding that the private consensual distribution of such materials is antithetical or decency or that such materials will lower the societal tone? Once again the Court appears to use an assumption that "obscene" materials are bad to justify its conclusion that they may legitimately be regarded as bad.

---

[10] We note that the Court's reasoning would be on much firmer ground under the obscenity test of *Regina v. Hicklin*, *supra*. Under that test a book could not be found to be obscene unless it was found to have a tendency to "deprave or corrupt." If a book were found obscene under *Hicklin* it would then be rational to find it a "bad" book in the sense of its probable antisocial impact upon at least some readers. But the *Miller* test which the Court substitutes for the "discredited" test of *Regina v. Hicklin* does not require a finding of a tendency to deprave or corrupt in order to find a book "obscene." If a book can thus be "obscene" without a tendency to deprave or corrupt, it is not logically permissible to assume, as the Court does, that obscene books inevitably tend to deprave and corrupt.

Perhaps in recognition of the circular nature of these arguments, the Court alludes to Professor Bickel's remarkable assertion that the private consensual distribution of sexual materials "'impinges upon other privacies'" (413 U.S. 59) so as to legitimate prohibitions. The argument seems to be that, if A and B and many others wish to exchange sexual materials in the "marketplace," C will inevitably know about their activities, although he is completely free to ignore them. If C does not approve of A's and B's activities, then C's "privacy" is impinged upon, apparently because C has a right of "privacy" not to know about conduct of which he disapproves. Thus the State may prevent A and B from doing what they wish, in order to protect C's "privacy" in stopping activities he dislikes in others.

Professor Bickel's asserted "privacies" are, in truth, nothing more than the interests of busybodies in telling others what they can and cannot do – quite the antithesis of privacy. Nor does Professor Bickel tell us why A's and B's "privacy" somehow applies only to what they do in their own homes, while C's "privacy" extends to whatever everyone else does anywhere in the community. If anyone's privacy is at issue, it is that of those who wish consensually to exchange materials without thrusting or forcing them on others, not that of those who wish to use the criminal law to force their fellow citizens to engage only in conduct of which they approve.

VII. Rehearing is required by the Court's complete failure to consider the relevant research and conclusions of the Commission on Obscenity and Pornography.

In 1967 Congress established the Commission on Obscenity and Pornography for the purpose of studying the

traffic in, effects of and legal considerations relating to explicit sexual materials. (P. L. 90-100, 81 Stat. 253). The Commission issued a voluminous Report in 1970. This Report summarized the state of scientific knowledge about explicit sexual materials at the time of the Commission's creation, as well as the results of extensive research carried out under Commission auspices during the Commission's life.

As noted in earlier portions of this brief, many of the Commission's findings bear direct relevance to the legal issues involved in the obscenity cases decided by the Court on June 21, 1973. In particular, the Commission devoted substantial energy and resources to studying the alleged "average" prurient interest appeal and patent offensiveness of certain "hard-core" sexual materials, as well as the assertion that these materials are lacking in social value. The Commission also studied assertions that hard-core sexual materials cause crime, other antisocial behavior and destructive or deviant personal attitudes. The Commission studied the question of whether obscenity laws had sufficient clarity to provide "fair notice" and "concrete guidelines" to those who must obey and enforce these laws. The Commission sought to discover what types of laws would have adequate clarity. The Commission studied the history of obscenity prohibitions to see whether it is accurate to characterize certain sexual materials as unprotected by the Constitution.

Despite the direct relevance of the Commission's research to the legal issues before the Court, *there is not one mention* of the Commission's findings on these matters in any of the majority's opinions in the June 21 cases. As we have shown in previous sections of this brief, these findings in fact contradict the Court's unsubstantiated assumptions in many areas.

One could perhaps understand this cavalier treatment of a substantial body of directly relevant research and findings of the Commission were an unofficial body, or a group tainted with evidence of bias and preconception. Precisely the opposite was true. The members of the Commission were chosen by the President of the United States. They included not one single person with any previous connection with the sexual materials industry. Three members of the Commission, on the other hand, had continuing and prominent association with groups organized for the purpose of repressing explicit sexual materials. The Chairman of the Commission was the Dean of the University of Minnesota Law School. The Vice-Chairman was the Director of the University of Michigan library. The other Commissioners included the Chief Judge of the Juvenile Court of Connecticut; the Attorney General of California; three clergymen; two psychiatrists specializing in children and youth – one associated with the Menninger Foundation and the other the Chairman of the Department of Psychiatry at the University of North Carolina; three sociologists – two from major universities (one the Chairman of his department) and the other the Director of Social Research for the Columbia Broadcasting System; professors of film art and English; the president of a major news distribution agency; the Executive Vice President of Pocket Books, Inc.; and the Deputy Attorney of the Motion Picture Association of the United States. Two members of the Commission were women.

Constitutional law, more than any other branch of law, owes an obligation to respect truth, It is inconceivable that any body seeking the truth about allegedly "obscene" materials could be satisfied with its efforts while it *totally ignored* the most comprehensive and impartial existing

collection of scientific knowledge on the subject. The Court is not required to accept the Commission's findings as either accurate or relevant. What is required is that the Court *consider* these findings, which on their face directly contradict the essential factual assumptions which expressly underlie the Court's decisions.

II.

THE PROVISIONS OF GEORGIA CODE 26-2101 AS WRITTEN AND APPLIED TO PETITIONERS HEREIN ARE REPUGNANT TO THE FIRST, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN PARTICULAR THE CONSTITUTIONALLY PERMISSIVE STRICT STANDARDS LAID DOWN BY THIS COURT IN *MILLER V. CALIFORNIA*, 413 U.S. 15.

On June 21, 1973, the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has forever changed the operative obscenity law.

The cases to which we make reference are as follows:

A. *Miller v. State of California*, No. 70-73, 413 U.S. 15,

B. *Paris Adult Theatre I, et al v. Slaton*, No. 71-1051, 413, U.S. 49,

C. *U.S.A. v. Orito*, No. 70-69, 413 U.S. 139,

D. *Kaplan v. State of California*, No. 71-1422, 413 U.S. 115,

E. *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, et al.*, No. 70-2, 413 U.S. 123,

Predicated on the foregoing decisions, this Court on June 25, 1973, by summary action and/or *per curiam* decisions vacated sixty (60) other obscenity cases on its docket in which no prior action had been taken. For a summary review of the cases to which we make reference herein, please note, 413 U.S. 902 et. seq.

This Court when it returned in October of 1973 for its new term continued the practice it started on June 25, 1973 of vacating and remanding back to the lower courts cases for obscenity law violations both Federal and State, Civil and Criminal. All of the vacated cases, without exception, proceeded under the *Roth-Memoirs* formulation and included one, *Cote v. U.S.A.*, No. 71-1120, 413 U.S. 915, wherein the defendant plead guilty and thereafter challenged the constitutionality of the statute on appeal.

On October 23, 1973 this Court vacated and remanded back to the Tenth Circuit the judgment in the case of *Harding v. U.S.*, Doc. No. 72-1646, 42 L.W. 3241. In the *Harding* case the Defendant conceded the obscenity of the material and challenged only the constitutionality of the law. All cases were, as previously stated, vacated and remanded for disposition by the lower courts.

After the decision of this Court in *Paris Adult Theatre I, et al v. Slaton*, counsel filed on July 16, 1973 a *Petition for*

Rehearing which petition was denied by this Court on October 9, 1973. (See 42 L.W. 3200). Among the grounds set forth by Counsel to ask this Court to reconsider or clarify its ruling in *Paris Adult Theatre I, et al* was as follows: "The vacation of the Judgment in this case and the Remand to the Georgia Supreme Court for 'further proceedings' leaves unconstitutionally vague what the duty is that is imposed upon the appellate court with regard to 'further proceedings'."

The effect of the court's decisions on the obscenity cases June 21 and 25, 1973 have caused substantial conflicts in both Federal and State jurisdictions as to what in fact this court has done in regard to pre-*Miller* conduct. Approximately eighteen (18) statutes have been ruled upon by appellate courts and Federal obscenity statutes as well as a state statute have been considered by eight (8) circuit courts of appeal and almost without exception each opinion is a shade different than the other and in some instances are diametrically opposed to one another. The Louisiana Supreme Court in the case of *Gulf States Theatres of Louisiana, et al, v. Richardson, et al* on remand concluded that what the U.S. Supreme Court had done is say that the *Roth-Memoirs* standards employed in the cases before it were unconstitutionally vague and for this reason set down a new constitutional standard. Thus the Supreme Court of the State of Louisiana held its obscenity law unconstitutional and went on to state that it was not the task of the judiciary to authoritatively construe or rewrite legislation and that it was the function of the Legislature. (A copy of the Decision of the Supreme Court of Louisiana as well as companion decisions in two (2) other cases entitled *State v. Shreveport News Agency, Inc.* and *State v. Richard Lee McNutt* are attached hereto in Appendix "D".)

The State of Indiana on remand of cases of *Mohney v. State* and *Stroud v. State* in the U.S. Supreme Court held that the effect of the U.S. Supreme Court's decision was to say that the *Roth-Memoirs* formulation for determining obscenity was unconstitutionally vague and they thus held that their state statutes were unconstitutionally vague. (See *Mohney v. State*, 300 N.E.2d 66 and *Stroud v. State*, 300 N.E.2d 100.)

The following represents a list of cases wherein appellate courts and/or *nisi pris* courts of record have ruled or reviewed cases involving pre-*Miller* conduct but in post-*Miller* decisions.

A. *STATE APPELLATE COURTS OR FEDERAL THREE JUDGE COURTS INVOLVING STATE OBSCENITY LAWS*

ALABAMA

United Artists Corporation vs.
E.L. Wrights, Jr., Inc., etc.

Civil Action # 4208-N
U.S.D.C. – M.D. of Alabama
Northern Division
(1-5-74)
(See Appendix D)

Chester McKinney vs. City of Birmingham

#509 – #516
Alabama Court of Appeals
(10-30-73)
(See Appendix D)

Harlow vs. City of Birmingham

#577, #582, #585
Alabama Court of Criminal Appeals
(1-15-74)
(See Appendix D)

CALIFORNIA

People of the State of California vs. Enskat, 109 Cal Rptr 433

California Court of Appeals
2nd Appellate Dist.
Div. 5

DISTRICT OF COLUMBIA

Kaplan vs. U.S., No. 5452
District of Columbia Court of Appeals
(11-21-73)
(See Appendix D)

FLORIDA

Rhodes vs. State

Supreme Court of Florida
Opinion iled Sept. 19, 1973
(See Appendix D)

Papp vs. State, 281 So 2d 600 (1973)

GEORGIA

Slaton, et al vs. Paris Adult Theatre

Supreme Court of Georgia
(10-30-73)
(See Appendix B)

Jenkins vs. The State No. 27692,
199 S.E.2d 183 (7-2-73)
Cert. granted 12-10-73 #73-557)

INDIANA

Mohney vs. State, 300 N.E.2d 66 (1973)
Stroud vs. State, 300 N.E.2d 100 (1973)

IOWA

State vs. Edward J. Wedelstedt,
David Cory & Wayne Davis
258 Supreme Court of Iowa (12-19-73)
1-56081
(See Appendix D)

State vs. Dale Lavin,
Edward J. Wedelstedt, etc.

Nos. IMI-242; IMI-319 In the Iowa District Court
IMI-396; IMI-397 In And For Linn County
IM2-230;IM2-231 August 13, 1973

LOUISIANA

State vs. Shreveport News Agency, Inc.
No. 53,985

Supreme Court of La.
(12-3-73)
(See Appendix D)

State vs. Richard Lee McNutt
No. 52,489

Supreme Court of La.
(12-3-73)
(See Appendix D)

Gulf States Theatres of La., et al
vs. John Richardson and
George W. D'Artois

No. 54,044
Supreme Court of La.
(12-3-73)
(See Appendix D)

MASSACHUSETTS

Commonwealth v. Claflin,
298 N.E. 2d 888

Appeals Court of Mass.
Decided July 11, 1973

MISSOURI

City of Kansas City vs. O'Connor #57266
City of Kansas City vs. McNellis#58132
City of Kansas City vs. Reed #58133

Supreme Court of Missouri
(10 8-73)

State, ex rel. Wampler vs.
Dick and Edna Bird, etc.

No. 57240
Supreme Court of Missouri
(10-8-73)
(See Appendix D)

NEW JERSEY

Hamar Theatres vs. Cryan, et al
No. 472-73
U.S.D.C. – District of New Jersey

U.S.D.C. - District of New Juersey
(7-26-73)
Petition for Cert. pending #73-711
(See Appendix D)

NEW YORK

People of the State of New York
vs. Jim Bucklay and Al Goldstein

No. 297
State of New York Court of Appeals
Decided: December 28, 1973

People of the State of New York
vs. Saul Heller

No. 184
State of New York Court of Appeals
Decided: December 28, 1973

Redlich v. Capri Cinema
347 N.Y. Supp. 2d, 811

NORTH DAKOTA

Jerry McCright, et al vs.
Allen I. Olson, et al

Civil Action #4849
U.S.D.C.
District of North Dakota,
Southeastern Div.
(12-17-73)
(See Appendix D)

OHIO

State, ex rel Keating vs. Vixen,
35 Ohio St.2d 215 (1973)

State, ex rel. Sensenbrenner vs. Adult Book Store,
301 N.E.2d 695 (1973)

SOUTH CAROLINA

State vs. Watkins

Supreme Court of South Carolina
No. 19727
(11-26-73)
(See Appendix D)

WISCONSIN

State of Wisconsin, ex rel. Joseph Chobot vs. Circuit Court for Milwaukee City.

State No. 179
(12-10-73)
(See Appendix D)

TENNESSEE

Bijou Theatre of Knoxville, Inc., et al vs. State of Tennessee

No. 243
Court of Criminal Appeals of Tenn.
(11-29-73)

Mitchum v. Tennessee

No. 10 Shelby County
Court of Criminal Appeals of Tenn.
(Nov. 20, 1973)
(See Appendix D)

Grigsby vs. Tennessee

No. 167 Sullivan County
Court of Criminal Appeals of Tenn.
(Oct. 9, 1973)

WASHINGTON

State vs. J-R Distributors, Inc.
512 P2d 1049 (July 27, 1973)

Supreme Court of Washington

B. FEDERAL "CIRCUIT COURTS"

FIRST CIRCUIT

U.S.A. vs. One Reel of Film,
481 F2d 206 (July 16, 1973)

SECOND CIRCUIT

U.S.A. v. Cangiano, et al.,
(12-27-73)

FOURTH CIRCUIT

Brown vs. U.S.A.

Petition for Writ of Certiorari
pending #73-788

FIFTH CIRCUIT

U.S.A. vs. Thevis & Peachtree News,
484 F2d 1149 (9-12-73)

Petition Pending #73-1075
#73-1091

(See Appendix D)

U.S.A. vs. Cote,
485 F2d 574 (10-11-73)

Petition for Certiorari pending
(See Appendix D)

SIXTH CIRCUIT

Southeastern Promotions, Ltd., vs.
Conrad, et al, 486 F2d 894 (1973)

Rehearing denied October 30, 1973

SEVENTH CIRCUIT

U.S.A. vs. Sians,
No. 71-1346 (July 5, 1973)

Appeal from the U.S.D.C. – N.D. of Illinois –
Western Div.

NINTH CIRCUIT

U.S.A. vs. Henson No. 73-2063
Opinion filed October 5, 1973

U.S. vs. Hamling, 481 F2d 307 (1973)
Rehearing denied (8-23-73)
Certiorari granted Jan. 14, 1974, 42 LW

TENTH CIRCUIT

U.S.A. vs. Friedman & Peachtree
Nat'l Distributors

No. 72-1143 and 1144
(12-11-73)

C. FEDERAL NISI PRIUS DECISIONS

CALIFORNIA

U.S.A. vs. Lang, 361 F.Supp. 380
(C D Calif 1973)

RHODE ISLAND

U.S.A. vs. Joseph Vinacco #7971
U.S.A. vs. Richard Shappy#7972
U.S.A. vs. Guarino, et al#7968
U.S.A. vs. Coleman #7970

TENNESSEE

U.S.A. vs. Carter — Criminal CR 72-207
U.S.D.C.-W.D. of Tenn.
Western Div. (12-12-73)

(See Appendix D)

It is the position of Petitioners that the State of Georgia obscenity statute was and is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 [1957].

When dealing with a claim of void for vagueness in the penumbra of the *First Amendment*, we must be mindful of the decision of the United States Supreme Court in *U.S.A. v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963), wherein the Court stated:

> "In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v, [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L.Ed.2d 405]."

To support our contention herein, we should like to briefly review the written opinions identified herein as cases (A) through (E) as will support our position.

Mr. Chief Justice Burger, in *Miller v. California, supra,* at page 4927, conceding the failure of the Court to set forth precise constitituional standards, writes in part as follows:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States[police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication [footnote omitted].' Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 704-705 (1968) (Harlan, J., concurring and dissenting)."

In a footnote 3 of the majority opinion appended to the foregoing quote, we read:

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. Redrup v. New York, 386 U.S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the Redrup 'policy.' See Walker v. Ohio, 398 U.S. 434, 435 (dissenting opinions) (1970). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."

The majority opinion further points out:

"The case we now review was tried on the theory that the California Penal Code §311 approximately incorporated the three-stage Memoirs test, supra. But now the Memoirs test *has been abandoned* as unworkable by its author and *no member of the Court today supports the Memoirs formulation.*" (Emphasis supplied.)

After recognizing the failure of any constitutional definiation of what is obscene accepted by a majority of the Court, the opinion of Mr. Chief Justice Burger goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

"This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229

(1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra 343 U.S. at 502 (1952)."

Thereupon the Court goes on to state what it now promulgates as a new constitutional standard for State cases (and in *U.S. v. Orito, supra,* and *U.S.A. v. 12-200 Ft. Reels of Super 8mm Film, supra* [see footnote] made potentially applicable to a federal obscenity case, after legislative enactment or authoritative judicial construction by the United States Supreme Court):

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future

legislative enactment or authoritative judicial construction (if possible) stated at page 3164:

> 'Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

It is important to note the context in which the Court was called upon to define the press materials that a State could permissibly regulate, and, in *Miller v. California, supra,* the new constitutional gloss placed on obscenity-pornography cases must be considered in light of the aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive sexually explicit materials. See 413 U.S., page 18 wherein appears the following caveat:

> "This case involves the application of a State[s criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S.

629, 637-643 (1968). Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

See also footnote 2 in further explanation.

Miller v. California, supra, is the key case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment.* It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by the Court in *Miller v. California, supra,* as far as specifically designating prohibited material is concerned. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope

of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guidelines necessary to forewarn a potential wrong doer. The element of the three part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the federal statute where we read:

> "(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct in a patently offensive way, sexual conduct that is specifically defined by state law . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated."

Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the legislature, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Georgia Legislature to create legislation anew adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the courts. Before the Appellate courts can so construe, there must exist a constitutionally permissible statute with which to work. The present Georgia statute can not be authoritatively

construed to meet the *Miller* test of specificity. It was one thing for this court to suggest constitutionally permissible limits; yet, it is another to add to a statute by authoritative judicial construction "specifically defined sexual conduct" never previously mentioned or defined by the State of Georgia Supreme Court. This Court said:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution.

In other words, it is one thing to "elaborate" on the *Roth* test as did the *Memoirs* court without judicially legislating. It is another to "create anew and engraft the *Miller* test" onto the present statutes. Any case, criminal or civil, pending trial or appellate review based on Pre-Miller conduct, should be set aside where there has not been given the "fair warning" suggested by this Court in *Miller*. The "fair warning" concept of a specifically defined statute prohibiting or punishing public obscenity would comport with Fifth and Sixth Amendment considerations as well as the all important First Amendment. Any case, criminal or civil pending trial or appellate review based on Pre-Miller conduct, in a jurisdiction where as, in the case at bar, there had been no authoritative judicial construction specifically defining the punitive patently offensive hard-core sexual conduct prior to the date on which the dissemination of the sexual materials occurred should be granted certiorari by this court and revised. It is clear that the present judicial construction by the Supreme courts of Georgia incorporating the *Miller* test must fail at this juncture

because the statute as written fails to give any person fair notice that criminal or civil liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

The United States Supreme Court's per curiam opinion in *Rabe v. Washington*, 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction in an effort to prevent the legislature having to take the trouble to enact a new statute, punishes one for conduct that was not criminal at the time that it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Georgia statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held punitively responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

The apparent constitutionally impermissible judicial construction of the questioned Georgia statute, if this Court takes no action, will become retroactively expanded by judicial construction to the detriment of the ordinary adult in our society. Facially, the statute is void for vagueness. The man in the street looking at this statute, however, will be lulled into a false sense of security because he has no reason to suspect that conduct clearly not described in the statute

and outside of the scope of the statute as written could be retroactively brought within the statute by an act of judicial construction, depending on the judicial forum. A deprivation of the right of fair warning results from an unforeseeable and retroactive judicial expansion of vague and imprecise statutory language, which is what Georgia will seek to convince this Court that it should do.

This Court's failure to strike down the applicable statutes as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retoractively, and which will operate precisely like an *ex post facto* law. All those actions done before the United States Supreme Court[s announcing of new standards and which were done innocently under old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the *Constitution* from passing laws of this nature and surely this Court and the various appellate and trial courts must be barred by the due process clause from achieving precisely the same results by judicial construction.

It is interesting to note that in only one case, *Kaplan v. California, supra,* did this Court affirmatively agree that the publication ("Suite 69") was obscene under the *Roth – Memoirs* formulation, which was an express part of the California Penal Code §311 (. at page 118) but, notwithstanding the concurrence of the majority of the United States Supreme Court with the independent constitutional judgment of the California appellate courts on review that the said publication was obscene, and notwithstanding the further finding at page 122 which reads:

"On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law to support Petitioner's conviction."

The case was also vacated and remanded.

We suggest that the action of this Court in vacating and remanding Kaplan, was an express acknowledgement of the patent unconstitutionality of the California Penal Statute. This Court sent the matter back to the appellate court for disposition consistent with its decisions announced on June 21, 1973, including the possibility of allowing the appellate court to make, if it could, a judicial construction to be applied prospectively. It is clear that the California appellate court is being given an opportunity to establish, if it can consistent with its constitutional authority, an authoritative judicial construction of the regulating State statute which would implement the newly announced permissible constitutional standards for judging proscribable obscenity, including "hard core" sexual conduct that is specifically defined by State law. (See examples suggested by the Court on page 25.)

It is clear, then, that in the event of such a ruling, Mr. Kaplan should not be held accountable.

The Supreme Court has stated:

"A ruling which is purely prospective does not apply even to the parties before the Court." Linkletter v. Walker, 381 U.S. 618 (1965) at page 621.

See also:

England v. Board of Medical Examiners, 375 U.S. 411;

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358.

In the original *Paris Adult Theatre* case this Court at 413 U.S. page 69 stated:

> "In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law as written or are authoritatively interpreted by the Georgia Courts, meets the First Amendment standards set forth in Miller vs. California, ante, at 23-25."

Whereupon the Court went on to say that the "Judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this Opinion and *Miller vs. California*, supra. See *United States vs. Twelve 20Ft. Reels of Film*, post at 130 n. 7."

On remand the Georgia Supreme Court in the decision in this case now being appealed from stated in part as follows:

> "In the past, this Court has defined and described conduct as obscene within the meaning of the Georgia statute in substantially the same language as that suggested by the Supreme Court in *Miller*. In *Evans Theatre Corp. vs. Slaton*, 277 Ga. 377, 379 [180 SE2d 712] [1971], we dealth with depictions of 'acts of sexual intercourse, natural, unnatural, bizarre, and violent.' In Walter vs. Slaton, 227 Ga. 676, 680 [182 SE2d 464] [1971], the films were of 'actual sexual activity, both natural and unnatural,' which included sexual intercourse, fellatio and cunninglingus. For a similar description of obscene material, see *1024 Peachtree Corporation vs. Slaton*, 228 Ga. 102 [184 SE2d 145] [1971]."

The case of *1024 Peachtree Corporation vs. Slaton* was a civil case and not a criminal case wherein the State sought to enjoin a corporation which operated the motion picture theatre from publicly showing an allegedly obscene film. The Court specifically stated that the film was found to be sexual conduct "graphically demonstrated in the close-up camera shots and scenes of Sandra, while completely nude, having sexual intercourse with nude men on numerous occasions throughout the entire film, and the cunnilingal act of Phil on Sandra, and Sandra masturbating." The Court went on to say "practically from the first frame, the film is dominated by nudity and sex, and we are unable to perceive how its appeal could be to anything but the prurient interest of its viewers." Whereupon the Court in its ruling stated:

> "Although we regard 'Sandra' as hard core pornography, the ruling we review here is not an Order finding the film obscene, but merely a finding of probable cause."

Thus it would appear then the 1024 Peachtree Corporation which the Supreme Court of Georgia cites for the proposition that they have specifically defined the kinds of conduct prohibited, this case did not involve the question of obscenity on final determination and it is clear that the Georgia Supreme Court only applied prurient interest test and none of the other factors to be involved.

Further as this case is reported in the West Digest System not one of the headnotes classifies this case as an obscenity case so that some one seeking to find out what judicial constructions Georgia had placed upon its obscenity law would probably not come across this particular citation. The Supreme Court of Georgia further indicated as set forth above that they had made a judicial determination of specifically defined hard-core patently offensive sexual conduct in *Evans Theatre Corp. v. Slaton.* The film involved in *Evans Theatre Corp. et al, v. Slaton* was entitled "I Am Curious (Yellow)". The Court says about the film "I Am Curious (Yellow)" that it relates to a young woman and her sex partner shown completely nude and during the course of the film "they engage in numerous acts of sexual intercourse, natural, unnatural, bizarre and violent. In a dream fantasy the young woman murders and castrates her sex partner. All of these scenes are explicit."

There were no actual depictions of sexual intercourse natural or unnatural in the movie "I Am Curious (Yellow)" a fact which can be attested to by the members of this court who were sitting on the court at the time the Grove Press case out of Maryland came before it. No one would seriously challenge the movie "I Am Curious (Yellow)" today as being obscene in any urban areas of this country including those found in the States of Maine or Mississippi, Las Vegas or New York City.

The only question presented regarding the constitutionality of Georgia Code *26-2101* in the *Evans Theatre Corp.* case was whether or not it (the statute) could be applied to the exhibition of obscene films to consenting adults. (See 227 Ga. 378). There was no request for construction of the statute with regard to determining the constitutionality of standards for assessing obscenity. The

Supreme Court, after the fact, now suggests that the authoritative judicial construction of 26-2101 has existed since the *Evans Theatre* case.

In the last case to be cited by the Georgia Supreme Court for the proposition that they had previously "authoritatively construed" the statute, we have *Walter v. Slaton,* 227 Ga. 676. No question was present in that case regarding constitutionality of the law (26-2101) or the standards to be applied or the issue that 26-21-1 is void for vagueness. No ruling was made by the court which authoritatively construed the statute in spite of the Georgia Supreme Court's comment in the *Paris Adult Theatre* case of October 30, 1973, that it had heretofore so construed the statute.

It may well be that the material as described in *Walter v. Slaton,* supra, might qualify as patently offensive depictions of hard-core sexual conduct but that conduct is not specifically defined by State statute. The Georgia Supreme Court by its majority opinion has also held that the movie "Carnal Knowledge" subject of an appeal pending in this court in case No. 73-557 was also hard-core pornography, yet, in that movie there was not one act of explicit sexual intercourse *fellatio* or *cunnilingual* activity. Too often courts are prone to call material "hard-core pornography" where it is simulated conduct versus actual conduct or where the conduct may be suggested and not consummated. This would be somewhat analagous to Indians being shot off their horses in Western movies and who roll over and play dead when we all know that they are not really dead but going through simulated motions.

To illustrate my point, I should briefly like to discuss some cases wherein this Court has held material not to be

obscene that was described by the *nisi prius* court or appellate courts as "hard-core pornography"

1. *Aday vs. U.S.*, 388 U.S. 447 (1967) paperback book entitled "Sex Life of a Cop". In the case *U.S.A. vs. West Coast News Company, Inc.*, 357 F2d 855 (1966) at pages 857 and 858 the Sixth Circuit characterized the material as "hard-core".

2. *Quantity of Books vs. Kansas*, 388 U.S. 452 (1967). Publications were paperback books entitled as follows: "Sin Hooked Bayou Sinners", "Lust Hungry", "Shame Shop". "Flesh Pot", "Sinner Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden", "Flesh Avenger".

The Supreme Court of Kansas in *State of Kansas vs. A Quanity of Books*, 416 P2d 703 (1966) called these publications "hard-core pornography."

3. *Shackman vs. California*, 388 U.S. 454 (1967). The description of the films before the court is reported at 258 F.Supp. 983 (1966) where the court said, "The court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard-core sense because they come within the reasonable purview and ambit of both the federal judicial definition of obscenity and hard-core pornography.

4. *Robert-Arthur Management Corp. vs. Tennessee*, 389 U.S. 578 (1968). Motion picture film entitled "Mondo Freudo".

The Tennessee Supreme Court in *Robert-Arthur Management Corp. v. State of Tennessee,* 414 S.W.2d 638 (1967) stated that this material was hard-core pornography.

5. *Walker vs. State of Ohio,* 398 U.S. 434 (1970) Publications involved were "Lurid Sinner", "Sin Crop", "Nifties, Vol. 195", "Peek-a-Boo, No. 4". The Fifth Appellate District of Ohio in *Walker v. State of Ohio,* No. 3464 (August 1969) held that, "it is our opinion and finding that if the material contained in the above and especially "Lurid Sinner' is not 'hard-core pornography' then that phrase is incapable of definition".

In the Paris Adult Theatre decision by the Georgia Supreme Court on October 30, 1973 they stated:

> "We, therefore, conclude that the Georgia statute has been specifically delineated in a manner consistent with the new *Miller* standards."

If the *Miller* standards are to mean anything consistent with one's constitutional rights of fair warning and notice, the Georgia Supreme Court has fumbled the ball and failed in the task assigned to it by this Court in 413 U.S. 49.

III.

THE TWO MOTION PICTURE FILMS INVOLVED IN THE CASE ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND THUS ARE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AS

THE SAME WAS APPLICABLE DURING THE PERIOD OF TIME COVERED BY THE ALLEGED CONDUCT CHARGED AGAINST PETITIONERS.

The non hard-core motion piture films involved herein are comparable to those held protected by this Court in the following case:

A. *Bloss vs. Michigan,* 402 U.S. 938 [1971]

B. *Cain vs. Kentucky,* 397 U.S. 319 [1970]

C. *Robert Arthur Management Corp. vs. Tennessee,* 389 U.S. 578 [1968]

D. *IM Amusement Corporation vs. Ohio,* 389 U.S. 573 [1968]

E. *Schackman vs. California,* 388 U.S. 454 [1967]

F. *Ratner vs. California,* 388 U.S. 442 [1967]

G. *Cobert vs. New York,* 388 U.S. 443 [1967]

This Court in *Miller vs. California,* supra, concedes that it must be the final arbitor and review each obscenity case that comes before it and cited with approval in *Miller* from *Roth* the following:

> "Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case."

Ever since the United States Supreme Court determined, in *Roth v. United States,* supra, that the *First*

Amendment did not protect obscene materials, it has necessarily assumed the responsibility of devising formulae for recognizing the "dim and uncertain", *Bantam Books v. Sullivan*, 372 U.S. 58, 60 (1963), which separates obscenity from protected expression. That the Court, in its attempts to separate obscenity from protected expression, has had its difficulties in articulating clear standards for prosecutors, courts, and citizens to follow is readily apparent from the multitude of fragmented opinions, which have emanated from the Court in lieu of clear majority decisions; *e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 143 (1966); *Ginzburg v. United States, supra; Jacobellis v. Ohio*, 378 U.S. 184 (1964), and the numerous others without opinion which have characterized the Court's efforts in this sphere.

This Court on June 21, 1973, long after the time of the alleged offense, has articulated standards for the future which they suggest will pass constitutional muster in *Miller v. California* and the other cases decided on that day. The majority of this Court attempted to find a solution to the imprecision of the various standards relied upon by the members of the Court prior tothis time and set out to fashion such new standards.

The motion picture films involved herein should be judged, if at all, by the status of the law on the standards being applied by the Courts as of the time of the conduct complained of (Dec. 28, 1970). Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the Redrup approach, and we shall address ourselves to the status of the law as it was for the purposes of this part of our argument.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after Roth, but it is significant to note a trend developed, which found

fruition in 1967 in the case of *Redrup v. New York, supra,*. For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the *First Amendment.* rights by Congress or by the State to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

This Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States,* supra, that no obscenity confiction or suppression could follow consistent with the *First Amendment.* Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York, supra.* The cases reversed are: *Austin v. Kentucky,* 386 U.S. 767 (1967); *Gent v. Arkansas,* 386 U.S. 767 (1967); *Ratner v. California,* 388 U.S. 422 (1967); *Cobert v. New York,* 388 U.S. 443 (1967); *Keney v. New York,* 388 U.S. 440 (1967); *Friedman v. New*

York, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Deykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina, supra, Wiener v. California, supra; Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed. 2d 539 (1971).

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression,[11] a majority of the Court has yet to agree on a precise test for determining obscenty.[12]

---

[11] But see Stewart, J., dissenting in *Ginzburg v. United States, supra:* "It is not accurate to say that the *Roth* opinion 'fashioned standards' for obscenity, because, as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved (354 U.S. at 481, n. 8). And in no subsequent case has a majority of the Court been able to agree on any such 'standards'."

[12] Probably the verbal formula closest to consensus so far appeared in *Memoirs v. Massachusetts, supra:* "... three

Admitting that the *Roth* Formula "is not perfect", *Jacobellis v. Ohio, supra,* raises "difficult problems", *Ibid.,* and is afflicted with "perhaps inherent residual vagueness", *Ginzburg v. United States,* supra, the Court's decision to adhere to *Roth* – "that we should try to live with it – at least until a more satisfactory definition is evolved", *Jacobellis v. Ohio, supra,* at 200 – was an interim accommodation to the Court's inability to reach a real consensus on the subject. Subsequent experience with the problem has produced no greater unanimity. Two Justices, Black and Douglas, who dissented in *Roth,* had never accepted the principle that obscenity may be regulated without violence to the *First Amendment* (see E.g., *Ginzburg v. United States, supra* at 476 [Black, J. dissenting] and at 482 [Douglas, J., Dissenting].

A third, Justice Stewart, held the view that obscenity regulation may be constitutional only if applied to "hard-core pornography."[13] Yet a fourth, Justice Harlan, had, when on

---

(Footnote 12 continued)
elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. 413, 418 (1966).

A preliminary, rather unilluminating definition of hardcore pornography, "I know it when I see it", *Jacobellis v. Ohio, supra* at 197 (Stewart, J., concurring) has been supplemented by Justice Stewart by the following description "of the kind of thing to which I have reference": "Such materials include photographs, both still and motion picture, with no pretense of artistic value, *graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism,* and sometimes involving several participants in scenes of orgy-like character . . ." *Ginzburg v. United States, supra* at 499, n. 3 (Stewart, J., dissenting). (Emphasis added.)

the bench, adopted the "hard-core pornography" test as to federal prosecutions, but had urged more latitude for conviction in state criminal cases. *Jacobellis v. Ohio, supra* at 204 (Harlan, J., dissenting). Justice Brennan, together with former Chief Justice Warren and former Justice Fortas, had adhered to the three-pronged enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, (1966), *set out in full in Ginzburg v. United States, supra* at 476 (Black, J., dissenting) and at 482 (Douglas, J., dissenting), a "not dissimilar standard" from the "hard-core pornography" test. The *per curiam* opinion in *Redrup v. New York* so equates the hard-core pornography test and the three-pronged *Memoirs* test. 386 U.S. 767, 770-771 (1967). And there are indications that three (3) of the newer justices, Chief Justice Burger, and Justice Blackmun, *Ibid.*, follow Justice Harlan's views and that Justice Marshall (see majority opinion in Marshal, J., in *Stanley v. Georgia,* 394 U.S. 557 (1969)) has adopted Justice Brennan's conception of *First Amendment* interpretation in this sphere.

Moreover, a majority of the Court has united to underscore the irrelevancy, for constitutional purposes of the claim that material is "arguably devoid of any ideological content", for "the line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all", *Stanley v. Georgia, supra,* citing with approval, *Winters v. New York,* 333 U.S. 507 (1948).

Findings of obscenity have been reversed as to press materials devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including

detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g., Memoirs v. Massachusetts,* supra, ("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop", see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry, supra,* ("Sin Whisper", see description of book at 146 S.E. 2d 764); *Mazes v. Ohio,* supra, ("Orgy Club"); *Hoyt v. Minnesota, supra,* ("The Way of a Man With a Maid", "Lady Susan's Cruise Lover", and three other books); and *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films, the Court has reversed findings of obscentity as to films which depict totally nude women, films which show nude or partially nude woman and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extrapolated from these decisions without opinion is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in

sexual poses and movement, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value is present and thus, the material would not be obscene.

The motion picture films at bar when considered as a whole, and as judged against press materials of similar or more explicit sexual content – heretofore, determined by this Court, not to be obscene in the constitutional sense, should thus be held protected, and the decision of the Supreme Court of Georgia should be summarily reversed.

IV.

THE VARIOUS UNITED STATES SUPRME COURT RULINGS ON OBSCENITY PROMULGATED ON JUNE 21 AND JUNE 25, 1973, EFFECTING A SUBSTANTIAL DECISIONAL CHANGED IN THE APPLICATION OF CONSTITUTIONAL PRINCIPLES, CANNOT BE APPLIED RETROACTIVELY TO PETITIONERS IN THE CASE AT BAR FOR CONDUCT OCCURRING PRIOR TO THOSE DECISIONS, AND, THE APPLICATION OF THE STATUTE TO SAID PETITIONERS IS VOID AS EX POST FACTO LEGISLATION BY VIRTUE OF ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The newly announced decisions of the Supreme Court in which reference has been made herein represented "a clear

break with the past," in the words of Mr. Justice Stewart in *Desist v. United States,* 394 U.S. 244, 248 (1969).

On June 25, 1973 in a matter coming out of the Fifth and Second Circuits, the United States Supreme Court updated and restated its concept of retrospective and prospective application of decisional law making.

In the case of *Gosa v. Mayden,* et al,413 U.S. ____, (1973), question of the application of the new constitutional concept is discussed in detail, as stated in part at page

> "Rather, the prophylactic rule there formulated 'created a protective umbrella serving to enhance' a newly recognized constitutional principle. Michigan v. Payne, ____U.S.____ (1973). (41 LW 4671). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In Williams v. U.S.A., 401 U.S. 646, 651 (1971) Mr. Justice White made it clear citing Linkletter v. Walker, 381 U.S. 618 (1965), that the Court has 'firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored."

See the extensive discussion of this subject in the following cases:

A. *Linkletter v. Walker,* Supra;

B. *Stovall v. Denno,* 388 U.S. 293, 297 (1967);

C. *Desist v. United States,* supra;

D. *Robinson v. Neil,* 409 U.S. 505 (1973);

E. *Michigan v. Payne,* 412 U.S. 47 (1973).

See also:

"Comment: Retroactive or merely prospective operation of new rule adopted by Court in overruling precedent – federal cases." 14 LEd 2d 992.

"Prospective Overruling and Retroactive Application in the Federal Courts." 71 Yale L.J. 907 (1962).

As has been stated the United States Supreme Court on June 21 and June 25, 1973 vacated and remanded approximately sixty-eight (68) obscenity cases to the lower courts for final disposition. It is clear that the action of this Court in this regard in vacating and remanding the said sixty-eight (68) cases approximately ten (10) others have been dealt with by this Court during the October 1973 term in the same way. The rationale of *Miller v. California,* supra (see *U.S. v. 12-200 Ft. Reels of Film,* supra, n. 7) is to apply only prospectively as the language of those decisions makes clear, because there was no constitutionally valid test pertaining to obscenity agreed to by a majority of the Court that would give fair warning to a defendant that his proposed course of conduct would subject him to possible criminal prosecution, and thus said vague laws were violative of the *Fifth, Sixth and Fourteenth Amendment* rights of such defendants. A federal judge in the U.S. District Court for the Central District of California (Judge Pregerson) on Wednesday, July 11, 1973 dismissed a federal indictment on a Motion to Dismiss for this very reason. The case is styled as *U.S. v. Lang,* 361 F. Supp. 380 (1973), U.S.D.C. for the Central District of California.

Appellate judges have dismissed indictments and/or informants against persons in Indiana as well as the States of Iowa, Louisiana, North Dakota, New Jersey and California on the basis that the same were brought under a law which is now lacking in specificity according to the Supreme Court decisions and thus unconstitutional as applied to the various defendants before the Court.

- - -

On August 21, 1973, the Supreme Court of Indiana reversed the convictions of the defendants in two cases in which certiorari was granted and the cases remanded on June 25, 1973 by an order identical to the order in this case. The two cases are *Stroud v. Indiana,* 273 N.E.2d 842 (1971) and *Mohney v. Indiana,* 276 N.E.2d 517 (1971) wherein they unanimously held:

> "The main thrust of those opinions so far as applicable to this case is that the statute under which the appellant was convicted is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.
>
> Pursuant to the order and direction of the U.S. Supreme Court we hold the statute involved in this case is unconstitutional on the grounds announced by that Court.

Therefore pursuant to the order of the United States Supreme Court the judgment and conviction of Appellant – Defendant is reversed and remanded to the trial court, and pursuant to the order of the United States Supreme Court, the trial court is directed to discharge the Defendant.

All Justices concur."

The two cases which reversed the convictions are *Stroud v. State*, N.E. 2d 100 1973, and *Mohney v. State*, 300 N.E.2d 66 1973.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *(United States v. Harriss*, 347 U.S. 612, 617.)

The Due Process clause of the *Constitution* requires that a court strike down a criminal statute where it was not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

The United States Supreme Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of law, Ibid., and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

See also:

A. *Rabe v. State of Washington,* 405 U.S. 313 (1972);

B. *Wright v. State of Georgia,* 373 U.S. 284 (1963);

C. *Palmer v. City of Euclid,* 402 U.S. 544 (1961);

D. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

If the newly announced constitutional principles promulgated by the United States Supreme Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner in the case at bar for alleged conduct said to be violative of the statute at a time during April 1971, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10.

An *ex post facto* law has been defined by the United States Supreme Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* that it was, when committed." *Calder v. Bull,* 3 Dall 386, 390 (Emphasis supplied).

This Court has said that "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *King v. Missouri,* 107 U.S. 221, 135.

To put this question in better prospective, we should like to discuss the summary of the general principles that would

relate to indictments and/or informations charging violations of State and/or federal laws pending trial or on appeal as of June 21, 1973 for conduct purportedly engaged in prior to that time:

A. BLACKSTONE'S RETROACTIVE THEORY THAT A COURT MERELY DISCOVERS WHAT THE LAW HAS ALWAYS BEEN WAS REJECTED BY THE U.S. SUPREME COURT.

The common law theory of Blackstone was that in a new decision overruling prior decisions or putting a non-judicial gloss on a statutory interpretation the courts merely discivered what the law always was and had been, and therefore did not effect any change in the law, and thus was retroactive. The theoretical basis for this has now been rejected. *Linkletter v. Walker,* supra, at pp. 622-623 (1964); accd. *United States v. Fay,* 333 F.2d 12, 15-16 (2d Cir. 1964), with citations. In *Linkletter* the court, 381 U.S. at 623, said:

> 'Thus the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective."

This statement follows a five-page discussion of what the court calls the history and theory of the Blackstonian rule that "the judge rather than being the creator of the law was but its discoverer" (381 U.S. at 623) as contrasted to the Austin theory that judges do engage in intersitial lawmaking (not rewriting of statutes). In rejecting the Blackstonian theory of automatic retroactivity, the court held (381 U.S. at 627) that there was no distinction to be drawn between

criminal and civil litigation, and specifically cited the criminal income tax evasion case of *James v. United States,* 366 U.S. 213 (1961), as an example of prospective overruling in a criminal case.*

Linkletter, supra, which rejected this Blackstonian theory involves the start of the whole body of case law to determine whether expanding constitutional safeguards in favor of defendants in State criminal trials, i.e. the *Fourth, Fifth* and *Sixth Amendments,* were to be applied retroactively or prospectively. See Annotation, 22 L.Ed. 2d 824-858. The considerations in our case are quite different, but some of the principles as to when constitutional protections are to be applied retroactively may be helpful. In any event, the Blackstonian principle of automatic retroactivity has been explicitly rejected and, in addition, the decision is not retroactive on *ex post facto* and related principles.

B. LACK OF FAIR NOTICE RULE.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta v. New Jersey,* supra, at page 453 (1939); *United States, v. Harriss,* 347 U.S. 612, 617 (1954); *Rabe v. Washington,* supra, at page 316 (1972).

---

*In *James* the criminal conviction for federal income tax evasion was set aside on the grounds that the taxpayer had a right to rely on the judicial gloss placed on the statute.

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie v. City of Columbia,* supra, at p. 352, the court said:

> "* * *If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta,* or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally,* the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

C. ANALYSIS OF THE MILLER DECISION.

Part I of the *Miller* decision traces the history of the obscenity law from *Roth.* It states that "apart from the initial formulation in the *Roth* case, no majority has at any time been able to agree on a standard," (page 22) that the *Memoirs* test was a plurality test only, and that as of June 21, 1973 even *Memoirs* had been abandoned by all members of the court.

Since under Part I of the *Miller* decision there were no standards, the court thereupon in Part II proceeded to set forth a new three-fold or tripartite test to serve as a basis for the prosecution *only when* and provided that under the second prong of the test patently offensive hard-core sexual conduct was specifically defined so as to give fair notice. The court (page 24) states it acknowledged the dangers of regulating expression, and hence, the definitions of sexual conduct which can be prohibited "must be specifically defined by applicable State law as written or authoritatively construed."

After the court set forth the new tripartite test with examples of what might be proscribed as patently offensive depictions of sexual conduct, the court continued (page 25):

> "Under the holdings announced today, *no one will be subject to prosecution* for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined* by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. * * *" (Emphasis supplied.)

On page 29 the court reiterated that it was only on June 21, 1973 that the court had agreed on concrete guidelines to isolate hard-core pornography. The Court said:

> "* * * But today, for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of Redrup v. New York, supra, and attempt to provide positive guidance to the federal and state courts alike." (Emphasis supplied.)

D. UNITED STATES V. 12-200 FT. REELS FOOTNOTE 7 – PROSPECTIVE APPLICATION.

In footnote 7 the court said that it was the duty of federal courts to authoritatively construe federal statutes and "we are prepared to construe such terms (i.e. obscene, lewd,

lascivious as used in the statute) as limiting regulated material to patently offensive *representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California.*" (Emphasis supplied.) We pass for the moment just how the court could construe a federal statute for arrests after June 21, 1973 with this wide range of permissible definitional options without legislating and without invoking an *Erie v. Tompkins* doctrine, and turn to prospective application.

(i) The court is prepared (in the future) to construe the federal statute to limit it to depictions of "hard core sexual conduct" which were for the *first time* and as of June 21, 1973 specifically set forth in *Miller.* This is a very clear statement that as of June 21, 1973 there was no definition of patently offensive hard-core sexual conduct, which the court said *must* be present before there can be any prosecution. Criminal convictions are not predicated on noneexistent standards and nonexistent definitions.

(ii) It would appear that the judicial statement in footnote 7 of the decision in *12-200 Ft. Reels,* supra, purporting to overrule a case wholly prospectively is in fact no more than a dictum, since it is by hypothesis, inapplicable to the parties or the controversy before the court. Nevertheless, such a dictum may be significant, with respect no future transactions or evens, as an indication that further reliance on the "overruled" case is no longer justified. In fact, such a dictum can achieve virtually the same effect without even using the word "overrule" in connection with the earlier decision. That is, the court, without declaring the earlier decision overruled, can simply issue a warning that subsequent to the date of the court's opinion or some specified future

date, any reliance on the earlier decision is unwarranted. If a person subsequently attempts to rely on the earlier decision despite this warning, the court, in deciding that person's case, can conclude that reliance after the date specified in the warning was unjustified, and the court can then declare, as a holding rather than as dictum, that the earlier decision is overruled. Thus, by using a two-stage overruling process, consisting first of a warning in the form of a dictum and secondly, if necessary, of a holding overruling an earlier decision, the court can achieve a desirable effect by changing a bad rule without defeating any strong, justifiable reliance interests.

Accordingly, it is conceivable that in the context of the enforcement of the State obscenity laws, which laws can only be authoritatively construed by a state appellant Court, that what this court has done is forewarned individuals who propose to engage in the business of selling sexually explicit materials that they may no longer rely upon the more permissive standards of the *Roth-Memoirs* formulation after the date of the court's decisional change of June 21, 1973. Any defendant on appeal to the high court for conduct engaged in post-June 21, 1973 may no longer say that a judicial construction in his case would be *ex post facto* when applied to him because as of the date of his alleged offense the court had not "authoritatively construed" federal statutes because, as was made significant in *Bouie v. City of Columbia*, supra, the hypothetical defendant could have foreseen the judicial gloss that was to be placed on the statute and thus the two-stage process suggested herein would be complete by (a) the authoritative judicial construction on the state obscenity statute, and (b) the affirmation of the conviction of a defendant tried under the proposed application of that statute for post-June 21, 1973 conduct.

To this counsel, the foregoing analysis is the only common sense one with regard to the intent of the court in its carefully chosen language utilized in footnote 7 of *12-200 Ft. Reels of Film*, supra, as to Federal legislation.

E. EX POST FACTO JUDICIAL LAWMAKING PROHIBITED.

As stated, punitive judgments are not predicated on nonexistent standards. At the same time, the new test and permissible definitions of legally proscribable obscenity may not be applied retroactively, which is why, incidentally, there were no affirmations of convictions by the Supreme Court in the sixty-eight (68) cases before it and vacated.

Under *Linkletter*, supra, the Blackstonian theory of automatic retroactivity was abandoned. In addition, in determining whether a new decision should be applied retroactively the Supreme Court has specifically held that unforeseen judicial enlargement of criminal statutes is prohibited as an *ex post facto* law, *Bouie v. City of Columbia*, supra, and many authorities, while not labeling it *ex post facto*, also proscribe the retroactive application of a decisional change in criminal law by a court which would work to the disadvantage of the accused.

Ex post facto laws (prohibited by Article], Sections 9 & 10 of the Constitution) generally include a change in the statutory law which in relationship to a criminal offense alters the situation of the accused to his disadvantage. *Thompson v. Utah*, 170 U.S. 343. Both the new serious literary, etc. value test and the new optional definitions of what might be proscribed as depictions of patently offensive hard core sexual

conduct substantially alter the situation of the pre-June 21, 1973 defendant to his obvious disadvantage. In *Bouie* the court said (378 U.S. at 353):

> "Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operates precisely like an ex post facto law such as Art. I § 10 (sic) of the Constitution forbids." (parenthesis and emphasis supplied.)

Bouie followed in *Love v. Fitzharris*, 460 F.2d 382, 385 (9th Cir. 1972), "new court decision making what was lawful when done, a crime *** prohibited by the Constitution."

While not labeled *ex post facto*, the decisions and authorities clearly prohibit a change in the criminal law by court decision which makes criminal that which was not criminal or expands the area of criminal liability by putting an interpretation on a statute which could not have been foreseen or cures a vagueness by that very decision. *James v. United States*, 336 U.S. 213, 221-222; *Shuttlesworth v. Birmingham*, 394 U.S. 147; *Bouie*, supra; *Rabe v. Washington*, supra, at p. 315; 20 Am. Jur. 2d Courts § 236; 51 Virginia Law Review 201, 254.

As previously maintained, the *James* case involved a prosecution for income tax evasion by one Mr. James who had embezzled funds but had not reported them. At the time James failed to report his income a Supreme Court decision in the Wilcox Case, *Commissioner v. Wilcox*, had held that embezzled funds did not constitute income. The Supreme Court held in *James v. United States*, supra, that the element of willfulness could not be proved in a criminal prosecution because James was entitled to rely on the statute with the

gloss placed upon it by Wilcox, and therefore the indictment had to be dismissed.

Shuttlesworth held a subsequent narrowing interpretation which can save a criminal statute cannot be applied retroactively. In *Shuttlesworth* the petitioner was convicted for failing to obtain a permit to have a parade. *Shuttlesworth* was convicted, his conviction was reversed on the grounds that the Birmingham ordinance granted too much discretion to the City of Birmingham in terms of denying parade permits. The highest court of Alabama by decision rewrote the city ordinance and after narrowly construing it, and thus saving it, thereupon reinstated *Shuttleworth's* conviction. The Supreme Court reversed. *Here pertinent,* the Supreme Court held that assuming the Alabama Supreme Court[s rewriting the ordinance was successful (394 U.S. at 155), that *Shuttlesworth* in 1963 could not have had the clairvoyance to foresee the narrowing construction which would ultimately be placed on the statute by the Alabama Supreme Court in 1967 (394 U.S. at 156).

In *Bouie,* supra, 378 U.S. at 352, the court in addition to *ex post facto* (though closely allied to it) said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute."

In *Rabe* the Supreme Court of Washington held the motion picture obscene because of the context or location of its exhibition (it was an outdoor theatre). In reversing the Supreme Court said:

> "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged from violation."

The court held no fair notice that criminal liability was dependent upon the place where the film was shown.

51 Virginia Law Review at 254:

> "As to judicial changes which expand the substantive criminal law the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal lawmaking, *which demands the same result in any event.*"

The statutory test in Georgia for determining what is obscene contains only three elements of the so-called *Roth-Memoirs* formulation but, at the moment by "authoritative judicial construction" only two (2) elements of the new tri-partite *Miller* test excepting specifically defined sexual conduct. Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's rights and this case should be reversed.

CONCLUSION

This Court in the original *Paris Adult Theatre I* case held that there was nothing that precluded "the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I and II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the *First Amendment* standards set forth in *Miller vs. California* ante, at 23-25."

The test set forth in *Miller* at page 24 reads in part:

"The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work taken as a whole, appeals to the prurient interest, *Kois vs. Wisconsin*, supra, at 230 quoting *Roth vs. United States*, supra, at 489; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

On page 25 of the *Miller* decision the Court stated:

"It is possible, however to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

(b) patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals;"

This Court in concluding its ruling on *Paris Adult Theatre I vs. Slaton*, 413 U.S. at 69 stated:

"The Judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this Opinion and *Miller vs. California*, supra." See *United States vs. 12-200 Ft. Reels of Film*, post, at 130 n. 7."

What the Georgia Supreme Court then did in the October 30, 1973 decision was to hold as follows:

"Under the standards announced by the Supreme Court in *Miller*, inhering in prior judicial decisions of this Court, and taken in conjunction with *Georgia Code Annotated 26-2101* § § B, the basic guidelines for determining whether materials or films are obscene in Georgia may be stated substantially as follows:

Applying contemporary community standards and considering the material or film as a whole, the average person would find:

"(a) its predominant appeal is to a prurient interest in sex;

(b) the material or film is a patently offensive depiction or description of sexual conduct, *embodying a shameful or morbid interest in nudity*, sex or excretion, and going substantially beyond customary limits of candor in describing or representing such matters;

(c) the material or film taken as a whole lacks serious literary, artistic, political or scientific value, and,

(d) the material or film taken as a whole is utterly without redeeming social value."

(e) In looking at the construction or judicial gloss the State of Georgia Supreme Court has now placed upon its obscenity statute 26-2101(b). Where do we find the (b) element of the test as stated by this Court as being constitutionally required in *Miller vs. California*, 413 U.S. at pages 24 and 25, that is to say sexual conduct specifically defined by the applicable state law. Georgia's judicial gloss on the obscenity

standards represents a mish-mash of *Roth-Memoirs* and *Miller* WITH A little of *Jenkins v. State of Georgia* thrown in. Even the test as set forth that proposes to take that part of the *Roth-Memoirs* test that formally was applicable, is mishandled.

Accordingly, for all the reasons set forth in the arguments contained in this Petition for Writ of Certiorari Petitioners respectfully pray that the Judgment of the Supreme Court of the State of Georgia of October 30, 1973 be reversed, that the statute be held to be unconstitutional and the motion picture films determined not to be obscene in the constitutional sense.

Respectfully submitted,

ROBERT EUGENE SMITH, Esquire
2005 – 100 Colony Square
Atlanta, Georgia 30361
(404) 892-8890

Of Counsel:

GILBERT H. DEITCH, Esquire
2005-100 Colony Square
Atlanta, Georgia 30361
(404) 892-8890